

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO;  
AMERICAN FEDERATION OF STATE  
COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO, ET AL., CASE NO. CV-25-01780 WHA  
SAN FRANCISCO, CALIFORNIA

PLAINTIFFS, FEBRUARY 27, 2025

VS. PAGES 1 - 73

UNITED STATES OFFICE OF  
PERSONNEL MANAGEMENT, ET AL.,

**DEFENDANTS.**

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WILLIAM H. ALSUP  
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

FOR THE PLAINTIFFS: ALTSHULER BERZON LLP  
BY: STACEY M. LEYTON  
DANIELLE E. LEONARD  
ROBIN S. THOLIN  
EILEEN B. GOLDSMITH  
JAMES BALTZER  
SCOTT KRONLAND  
177 POST STREET, SUITE 300  
SAN FRANCISCO, CALIFORNIA 94108

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,  
TRANSCRIPT PRODUCED WITH COMPUTER.

1  
2       A P P E A R A N C E S: (CONT'D)

3       FOR THE PLAINTIFFS:                   AMERICAN FEDERATION OF GOVERNMENT  
4   EMPLOYEES

5   BY: RUSHAB SANGHVI  
6   80 F STREET, NW  
7   WASHINGTON, DC 20001

8       FOR THE DEFENDANTS:                   UNITED STATES ATTORNEY'S OFFICE  
9   BY: KELSEY J. HELLEND

10   450 GOLDEN GATE AVENUE, BOX 36055  
11   SAN FRANCISCO, CALIFORNIA 94102

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1 SAN FRANCISCO, CALIFORNIA

FEBRUARY 27, 2025

2 P R O C E E D I N G S

3 (COURT CONVENED AT 1:31 P.M.)

4  
5 THE CLERK: TO THE ZOOM ATTENDEES, ANY RECORDING OF  
6 THIS PROCEEDING BY VIDEO, AUDIO, AND INCLUDING SCREENSHOTS IS  
7 STRICTLY PROHIBITED.

8 CALLING CIVIL ACTION 25-1780, AMERICAN FEDERATION OF  
9 GOVERNMENT EMPLOYEES, ET AL., VERSUS UNITED STATES OFFICE OF  
10 PERSONNEL MANAGEMENT.

11 COUNSEL, PLEASE APPROACH THE PODIUM AND STATE YOUR  
12 APPEARANCES FOR THE RECORD BEGINNING WITH COUNSEL FOR  
13 PLAINTIFFS.

14 MS. LEONARD: GOOD AFTERNOON, YOUR HONOR.

15 DANIELLE LEONARD FROM ALTSCHULER BERZON FOR PLAINTIFFS.

16 MS. LEYTON: GOOD AFTERNOON, YOUR HONOR.

17 STACEY LEYTON, COUNSEL FOR PLAINTIFFS AS WELL.

18 AND I'M HERE WITH EILEEN GOLDSMITH, ROBIN THOLIN,

19 JAMES BALTZER, SCOTT KRONLAND, AND RUSHAB SANGHVI.

20 THE COURT: WELCOME.

21 MR. HELLAND: GOOD AFTERNOON, YOUR HONOR.

22 ASSISTANT UNITED STATES ATTORNEY KELSEY HELLEND FOR THE  
23 DEFENSE.

24 THE COURT: THANK YOU. WELCOME.

25 OKAY. WE'RE HERE ON A MOTION BY PLAINTIFFS FOR A TRO, AND

01:32PM 1 I'M READY TO HEAR ARGUMENT. SO WE'LL START WITH THE MOVING  
01:33PM 2 PARTY.

01:33PM 3 MS. LEONARD: THANK YOU, YOUR HONOR. GOOD  
01:33PM 4 AFTERNOON.

01:33PM 5 THE PLAINTIFF COALITION OF LABOR CONSERVATION, VETERANS,  
01:33PM 6 AND SMALL BUSINESS GROUPS IS HERE TODAY TO ASK THIS COURT TO  
01:33PM 7 STOP THE UNLAWFUL TERMINATION OF FEDERAL EMPLOYEES ACROSS THIS  
01:33PM 8 COUNTRY.

01:33PM 9 I'LL START WITH THE FACTUAL ISSUE THAT IS AT THE HEART OF  
01:33PM 10 THIS CASE, AND THEN WE'LL HAPPILY DISCUSS ANY OF THE LEGAL  
01:33PM 11 ISSUES THAT FLOW FROM THAT.

01:33PM 12 AND MY COLLEAGUE, STACEY LEYTON, WILL BE PREPARED IN  
01:33PM 13 PARTICULAR TO DISCUSS ANY QUESTIONS REGARDING STANDING OR HARM.

01:33PM 14 FIRST AND FOREMOST, OPM GAVE THE ORDER TO TERMINATE  
01:33PM 15 FEDERAL EMPLOYEES THAT IS AT ISSUE HERE. "FIRE EVERYONE EXCEPT  
01:33PM 16 FOR A LIMITED NUMBER OF PEOPLE WHO YOU ASK TO BE HELD BACK AS  
01:33PM 17 MISSION CRITICAL."

01:33PM 18 THEN OPM APPROVED OR DISAPPROVED THOSE EXCEPTIONS AS WELL.

01:33PM 19 HOW DO WE KNOW THIS?

01:33PM 20 BECAUSE AGENCIES ACROSS THE FEDERAL GOVERNMENT HAVE SAID  
01:33PM 21 SO.

01:34PM 22 TESTIMONY IN FRONT OF CONGRESS, STATEMENTS TO THEIR OWN  
01:34PM 23 WORKERS: OPM MADE US DO THIS, OPM DIRECTED THIS, OPM GAVE US  
01:34PM 24 THE TEMPLATE THAT TOLD EMPLOYEES THAT THEY WERE BEING FIRED FOR  
01:34PM 25 PERFORMANCE EVEN WHEN THEY WERE NOT.

01:34PM 1 AS AGAINST THIS MOUNTAIN OF EVIDENCE THAT OPM DIRECTED THE  
01:34PM 2 ACTIONS AT ISSUE HERE, OPM HAS SUBMITTED A SINGLE DECLARATION,  
01:34PM 3 YOUR HONOR, FROM ACTING DIRECTOR EZELL DENYING THAT OPM ORDERED  
01:34PM 4 THESE TERMINATIONS.

01:34PM 5 BUT THE DOCUMENTS THEY ATTACH TO THAT DECLARATION PUT THE  
01:34PM 6 TRUTH TO THE LIE, AND IT IS A LIE, YOUR HONOR.

01:34PM 7 THE FEBRUARY 14TH EMAIL IS AN ORDER TO AGENCIES THAT SAYS  
01:34PM 8 WE NOW DEFINE PERFORMANCE AS ONLY THOSE MISSION CRITICAL  
01:34PM 9 EMPLOYEES AND FIRE EVERYONE ELSE. THAT IS WHAT THE ATTACHMENT  
01:34PM 10 TO MR. EZELL'S DECLARATION TELLS THE AGENCIES TO DO. AND  
01:35PM 11 REPORT BACK AFTER YOU HAVE FIRED EVERYONE.

01:35PM 12 WE WILL PROVE IN THIS CASE THAT REMARKABLY, AND I DO NOT  
01:35PM 13 SAY THIS LIGHTLY, YOUR HONOR, ACTING DIRECTOR EZELL IS NOT  
01:35PM 14 TELLING THE TRUTH TO THIS COURT.

01:35PM 15 THE COURT: I WANT TO MAKE SURE I'M FOCUSSING ON THE  
01:35PM 16 RIGHT DOCUMENT. THE ONE I HAVE HERE IS DATED JANUARY 20.  
01:35PM 17 BUT YOU REFERRED TO AN EMAIL DATED FEBRUARY 14TH.

01:35PM 18 MS. LEONARD: THAT IS CORRECT, YOUR HONOR.

01:35PM 19 THE COURT: CAN I SEE THAT? I THOUGHT IT WAS ALL  
01:35PM 20 VERBAL. SO I -- SHOW ME THE FEBRUARY 14TH ONE. I DON'T HAVE  
01:35PM 21 EVERYTHING UP HERE. I JUST HAVE WHAT I -- DO YOU HAVE IT  
01:35PM 22 HANDY?

01:35PM 23 MS. LEONARD: I DO, AND WE CAN PASS UP A COPY OF IT.  
01:35PM 24 IT IS -- THANK YOU.

01:36PM 25 THIS IS -- FOR THE RECORD, THIS IS AN EXHIBIT TO

01:36PM 1 MR. EZELL'S DECLARATION. IT WAS A FEBRUARY 14TH EMAIL.

01:36PM 2 MR. HELLMAN: JUST TO CONFIRM, IS THIS AT DOCKET

01:36PM 3 37-1?

01:36PM 4 MS. LEONARD: YES.

01:36PM 5 THE COURT: WELL, WAIT A MINUTE. I DO HAVE THIS

01:36PM 6 ONE. HANG ON A MINUTE. WHY IS IT THAT I'M CONFUSED?

01:36PM 7 MS. LEONARD: SO THERE WAS FIRST A JANUARY 20TH

01:36PM 8 COMMUNICATION.

01:36PM 9 THE COURT: YEAH.

01:36PM 10 MS. LEONARD: AND THEN WE CONTEND, AS IT WAS WIDELY

01:36PM 11 REPORTED, ON FEBRUARY 13TH THERE WAS A TELEPHONE CALL WHERE

01:36PM 12 THEY ORDERED AGENCIES TO FIRE, THAT THEY FOLLOWED UP WITH THIS.

01:36PM 13 THE COURT: ALL RIGHT. I SEE THE -- I HAD IT AFTER

01:36PM 14 ALL. IT WAS PART OF THE JANUARY -- IT LOOKED LIKE IT WAS JUST

01:36PM 15 PART OF THE JANUARY 20, BUT IT'S TWO DIFFERENT THINGS I GUESS.

01:36PM 16 ALL RIGHT. I'M NOW BACK ON TRACK. SO GO BACK TO YOUR --

01:37PM 17 IT WOULD HELP ME TO HAVE A CHRONOLOGY HERE.

01:37PM 18 SO THERE'S JANUARY 20 AND THEN YOU JUST REFERRED TO

01:37PM 19 SOMETHING THAT I DIDN'T KNOW ABOUT, FEBRUARY 13TH.

01:37PM 20 MS. LEONARD: CORRECT. SO ON JANUARY 20TH, WHAT

01:37PM 21 THEY DID WAS ASK ALL THE AGENCIES TO IDENTIFY THE PROBATIONARY

01:37PM 22 EMPLOYEES.

01:37PM 23 AND THEN ON FEBRUARY 13TH -- I'M SORRY. ON FEBRUARY 11TH,

01:37PM 24 THE PRESIDENT ISSUED AN EXECUTIVE ORDER THAT TOLD AGENCIES TO

01:37PM 25 START PLANNING FOR RIFTS, BUT DIDN'T SAY ANYTHING ABOUT FIRING

01:37PM 1 PROBATIONARY EMPLOYEES.

01:37PM 2 THEN ON FEBRUARY 13TH, YOUR HONOR, AS IS WIDELY REPORTED

01:37PM 3 IN THE PRESS, AND WE BELIEVE TO BE TRUE FROM STATEMENT MADE BY

01:37PM 4 AGENCIES AFTER THE FACT AS THEY TOLD THEIR EMPLOYEES, THERE WAS

01:37PM 5 A TELEPHONE CALL BETWEEN OPM AND THE AGENCIES.

01:37PM 6 THE COURT: HOW MANY AGENCIES?

01:37PM 7 MS. LEONARD: WE DO NOT KNOW BECAUSE IT WAS NOT

01:37PM 8 PUBLIC.

01:37PM 9 THE COURT: LIKE 50? OR ALL AGENCIES?

01:38PM 10 MS. LEONARD: ALL, YOUR HONOR.

01:38PM 11 THE COURT: WELL, THAT'S A LOT OF AGENCIES. OKAY.

01:38PM 12 ALL RIGHT. TELEPHONE CALL. WHAT HAPPENED IN THAT CALL?

01:38PM 13 MS. LEONARD: WE BELIEVE --

01:38PM 14 THE COURT: WHAT DOES THE RECORD ACTUALLY SHOW

01:38PM 15 HAPPENED AS OPPOSED TO WHAT YOU'RE ARGUING?

01:38PM 16 MS. LEONARD: WHAT AGENCIES HAVE SAID IS THAT OPM

01:38PM 17 ORDERED THE AGENCIES TO FIRE THEIR PROBATIONARY EMPLOYEES WITH

01:38PM 18 FEW EXCEPTIONS, YOUR HONOR.

01:38PM 19 THE COURT: WITH TWO EXCEPTIONS?

01:38PM 20 MS. LEONARD: WITH FEW EXCEPTIONS.

01:38PM 21 THE COURT: ALL RIGHT.

01:38PM 22 MS. LEONARD: AND THEN THEY FOLLOWED IT UP WITH THIS

01:38PM 23 COMMUNICATION TO AGENCIES ON FEBRUARY 14TH, WHICH SAYS WE HAVE

01:38PM 24 ASKED YOU -- WE HAVE ASKED THAT YOU SEPARATE PROBATIONARY

01:38PM 25 EMPLOYEES THAT YOU HAVE NOT IDENTIFIED AS MISSION CRITICAL BY

01:38PM 1 NO LATER THAN THE DAY ON MONDAY, FEBRUARY 17TH. PRESIDENT'S  
01:38PM 2 DAY, YOUR HONOR.

01:38PM 3 WE HAVE ATTACHED A TEMPLATE LETTER.

01:38PM 4 WE HAVE ASKED YOU TO SEPARATE YOUR EMPLOYEES.

01:38PM 5 SO ACTING DIRECTOR EZELL HAS TOLD THIS COURT, WE DIDN'T  
01:38PM 6 ORDER ANY TERMINATIONS. AND THE DOCUMENT THAT OPM SENT TO THE  
01:38PM 7 AGENCIES ADMITS THAT THEY ORDERED THE TERMINATIONS, YOUR HONOR.

01:39PM 8 THE COURT: WELL, SHOW ME WHICH ONE DOES THAT? THE  
01:39PM 9 FEBRUARY 14TH?

01:39PM 10 MS. LEONARD: CORRECT.

01:39PM 11 THE COURT: ALL RIGHT. READ TO ME THE PARAGRAPH  
01:39PM 12 THAT DOES THAT.

01:39PM 13 MS. LEONARD: "WE HAVE ASKED THAT YOU SEPARATE  
01:39PM 14 PROBATIONARY EMPLOYEES THAT YOU HAVE NOT IDENTIFIED AS MISSION  
01:39PM 15 CRITICAL NO LATER THAN THE END OF THE DAY MONDAY,  
01:39PM 16 FEBRUARY 17TH. WE HAVE ATTACHED A TEMPLATE LETTER."

01:39PM 17 AND THAT TEMPLATE LETTER, YOUR HONOR, WHICH THE GOVERNMENT  
01:39PM 18 DID NOT GIVE TO YOU, BUT WE HAVE. WE HAVE GIVEN YOU THE  
01:39PM 19 TEMPLATE LETTER. IT IS ATTACHED TO A DOD COMMUNICATION THAT WE  
01:39PM 20 HAVE IN WHICH THEY SAID THIS IS THE LETTER THAT WE GOT FROM  
01:39PM 21 OPM, THE DEPARTMENT OF DEFENSE.

01:39PM 22 THE TEMPLATE LETTER SAYS, "YOU ARE FIRED FOR YOUR  
01:39PM 23 PERFORMANCE."

01:39PM 24 OPM DIRECTED THESE TERMINATIONS, YOUR HONOR, AND OPM  
01:39PM 25 ORDERED THE AGENCIES TO USE THIS LETTER IN WHICH THEY FIRED

01:39PM 1 PEOPLE FOR THEIR PERFORMANCE WHEN THEY KNEW THAT WAS NOT TRUE.

01:39PM 2 THAT IS THE FACTUAL ISSUE AT THE HEART OF THE CASE, DID

01:40PM 3 THEY DO THAT?

01:40PM 4 WE BELIEVE THERE'S A MOUNTAIN OF EVIDENCE THAT HAS

01:40PM 5 ESTABLISHED THAT THEY DID. THE AGENCIES ARE SAYING THIS.

01:40PM 6 SOMEONE TESTIFIED FROM THE VA TO CONGRESS JUST A FEW DAYS AGO

01:40PM 7 THAT OPM DIRECTED US TO DO IT.

01:40PM 8 THE I.R.S. HAS TOLD ALL OF ITS EMPLOYEES, OPM MADE US DO

01:40PM 9 THIS.

01:40PM 10 THE NATIONAL SCIENCE FOUNDATION TOLD ITS PROBATIONARY

01:40PM 11 EMPLOYEES TUESDAY MORNING, 9:00 A.M., THEY CALLED A 10:00 A.M.

01:40PM 12 MEETING, THE DAY AFTER PRESIDENT'S DAY, TO FIRE EVERYONE AND

01:40PM 13 THEY SAID WE TRIED TO SAVE YOU, WE ADVOCATED FOR YOU, AND THEY

01:40PM 14 TOLD US FIRE THEM ALL.

01:40PM 15 THIS IS COMING FROM AGENCY AFTER AGENCY AFTER AGENCY,

01:40PM 16 YOUR HONOR. WE HAVE GIVEN YOU ALL OF THE STATEMENTS THAT WE

01:40PM 17 HAVE, AND THEY HAVE GIVEN YOU IN RESPONSE A SINGLE DECLARATION

01:40PM 18 FROM ACTING DIRECTOR EZELL IN WHICH THEY JUST BALDLY DENY IT.

01:40PM 19 THERE IS NOT A SINGLE DECLARATION, YOUR HONOR, FROM ANY

01:40PM 20 AGENCY OF THE FEDERAL GOVERNMENT, THE AGENCIES THEY NOW CLAIM,

01:40PM 21 FALSELY, THAT MADE THESE DECISIONS INDEPENDENTLY,

01:41PM 22 SPONTANEOUSLY, ALL AT EXACTLY THE SAME TIME, TO FIRE ALL OF

01:41PM 23 THEIR PROBATIONARY EMPLOYEES.

01:41PM 24 IT IS SIMPLY NOT CREDIBLE, YOUR HONOR.

01:41PM 25 SO PLAINTIFFS ARE INCREDIBLY LIKELY TO SHOW AND PROVE IN

01:41PM 1 THIS CASE THAT OPM DID THIS.

01:41PM 2 AND IF THAT IS TRUE, IF THAT IS TRUE, YOUR HONOR, IT IS

01:41PM 3 INCREDIBLY UNLAWFUL. IT IS UNLAWFUL IN AT LEAST SIX DIFFERENT

01:41PM 4 WAYS.

01:41PM 5 SO IF WE START FROM THAT POINT, THAT FACTUAL ISSUE, IF WE

01:41PM 6 ARE ABLE TO PROVE THAT, AND WE BELIEVE EVEN JUST ON THIS TRO WE

01:41PM 7 HAVE SHOWN THE COURT THAT THAT IS WHAT HAPPENED, AND BY THE

01:41PM 8 TIME WE GET FURTHER IN THIS CASE, WE WILL CERTAINLY HAVE MORE

01:41PM 9 EVIDENCE, AND WE WILL GO OUT AND GET IT IF YOUR HONOR ALLOWS US

01:41PM 10 TO.

01:41PM 11 IF WE START FROM THAT FACTUAL DETERMINATION, OPM HAS NO

01:41PM 12 LEGAL AUTHORITY TO ORDER THE TERMINATION OF ANY EMPLOYEE AT A

01:42PM 13 FEDERAL AGENCY, LET ALONE ALL OF THE PROBATIONARY EMPLOYEES

01:42PM 14 NATIONWIDE.

01:42PM 15 THE COURT: DOES THE GOVERNMENT OR THE DEFENDANT, I

01:42PM 16 GUESS, OPM, DOESN'T COUNSEL FOR OPM AGREE WITH YOU ON THAT

01:42PM 17 POINT, THAT OPM DOES NOT HAVE THE AUTHORITY TO FIRE AND HIRE?

01:42PM 18 MS. LEONARD: I WOULD -- I'M SORRY.

01:42PM 19 THE COURT: I THINK THEY AGREE WITH THAT.

01:42PM 20 BUT WHAT DO THEY ARGUE THAT THEY DID INSTEAD?

01:42PM 21 MS. LEONARD: SO I AGREE THAT THEY HAVE CONCEDED

01:42PM 22 BECAUSE THEY HAVE NOT TRIED TO DEFEND OPM'S -- THEY SIMPLY

01:42PM 23 ARGUE THE FACTUAL POINT AND SAY WE DIDN'T DO IT, RELYING ONLY

01:42PM 24 ON THE SINGLE LINE IN DIRECTOR EZELL'S DECLARATION.

01:42PM 25 AND THEN THEY SAY WE JUST GAVE GUIDANCE, ALL WE DID WAS

01:42PM 1 GIVE GUIDANCE TO THE AGENCIES, AND THEY MADE THEIR OWN  
01:42PM 2 INDEPENDENT DECISIONS. ALL OF THE FACTS, THE TIMING -- IF THIS  
01:42PM 3 WERE A TRIAL ON THIS ISSUE, YOUR HONOR, WE WOULD WIN TOMORROW.  
01:42PM 4 THERE IS NO WAY THAT THE AGENCIES INDEPENDENTLY MADE THESE  
01:43PM 5 DECISIONS IN THE TIMEFRAME AND ACCORDING TO THE LAW THAT THEY  
01:43PM 6 HAVE TO FOLLOW.

01:43PM 7 BUT IF -- SO WE AGREE THAT THEY HAVE CONCEDED THAT OPM  
01:43PM 8 DOESN'T HAVE THE LEGAL AUTHORITY.

01:43PM 9 WHAT THEY'VE TRIED TO SAY IS THAT IT WAS LAWFUL FOR THE  
01:43PM 10 AGENCIES TO DO THIS BECAUSE THE GOVERNMENT'S POSITION FOR THE  
01:43PM 11 FIRST TIME IN HISTORY OF THE UNITED STATES IS THAT THESE  
01:43PM 12 EMPLOYEES CAN BE FIRED AT WILL.

01:43PM 13 THAT IS NOT THE LAW, YOUR HONOR. PROBATIONARY EMPLOYEES  
01:43PM 14 AND AGENCIES DO HAVE OBLIGATIONS BEFORE FIRING PROBATIONARY  
01:43PM 15 EMPLOYEES. WE'VE SET IT FORTH IN OUR BRIEFING.

01:43PM 16 AND MOREOVER, IF THEY ARE GOING TO ENGAGE IN A RIF, THERE  
01:43PM 17 ARE STATUTORY OBLIGATIONS FOR THAT AND THAT THEY HAVE NOT  
01:43PM 18 COMPLIED WITH;

01:43PM 19 AND THEY CERTAINLY THEY CERTAINLY CANNOT FIRE PEOPLE BASED  
01:43PM 20 ON A LIE CLAIMING PERFORMANCE WAS THE REASON WHEN IT IS NOT.

01:43PM 21 THERE IS NO TIME -- WE HAVE A DECLARATION FROM THE FORMER OPM  
01:44PM 22 DIRECTOR TO SAY THIS IS NOT LAWFUL AND THERE IS NO WAY, IT IS  
01:44PM 23 NOT POSSIBLE FOR THE AGENCIES TO HAVE CONDUCTED THE TYPE OF  
01:44PM 24 PERFORMANCE EVALUATIONS THAT THEY WOULD HAVE TO CONDUCT TO MAKE  
01:44PM 25 THOSE LETTERS TRUE.

01:44PM 1 THOSE LETTERS ARE NOT TRUE.

01:44PM 2 SO WHAT OPM HAS ENGAGED IN HERE IS A WHOLESALE FRAUD ON

01:44PM 3 THE FEDERAL WORK FORCE TO TERMINATE THEM ALL ON THE PRETEXT OF

01:44PM 4 PERFORMANCE WHEN IT'S NOT TRUE. THAT VIOLATES AT LEAST THE

01:44PM 5 STATUTES THAT GOVERN --

01:44PM 6 THE COURT: COULD YOU SHOW ME THAT TEMPLATE LETTER.

01:44PM 7 MS. LEONARD: YES. THAT IS --

01:44PM 8 THE COURT: I'VE SEEN SOME OF THESE. I'VE TRIED TO

01:44PM 9 COME UP TO SPEED ON YOUR CASE.

01:44PM 10 SOME OF THEM DON'T SAY PERFORMANCE.

01:44PM 11 MS. LEONARD: THE TEMPLATE THAT OPM PROVIDED,

01:44PM 12 YOUR HONOR -- SOME OF THEM -- THAT IS RIGHT THAT SOME OF THEM

01:44PM 13 SAY YOU'RE JUST BEING FIRED.

01:44PM 14 THE TEMPLATE --

01:45PM 15 THE COURT: THAT'S RIGHT, SOME SAY YOU'RE FIRED AND

01:45PM 16 SOME SAY -- I DON'T KNOW, I'M TRYING TO FIND OUT HOW MANY

01:45PM 17 ACTUALLY DID SAY PERFORMANCE.

01:45PM 18 MS. LEONARD: SO THE TEMPLATE FROM OPM IS ATTACHED

01:45PM 19 TO THE SCHWARZ REPLY DECLARATION. IT'S EXHIBIT C, AND I CAN

01:45PM 20 GET YOU A COPY.

01:45PM 21 THE COURT: OKAY. GIVE ME A COPY, BUT I WOULD LIKE

01:45PM 22 YOU TO READ INTO THE RECORD FOR THE BENEFIT OF THE PUBLIC THE

01:45PM 23 KEY LANGUAGE.

01:45PM 24 MS. LEONARD: I'M BEING CORRECTED. IT'S EXHIBIT D.

01:45PM 25 DO YOU GUYS HAVE A COPY?

01:45PM 1 LET ME GET YOU MY COPY, YOUR HONOR.

01:45PM 2 (PAUSE IN PROCEEDINGS.)

01:46PM 3 MS. LEONARD: IT IS EXHIBIT D. IT IS AN TEMPLATE

01:46PM 4 THAT DOES NOT HAVE THE AGENCY NAME. IT'S MEMORANDUM FOR

01:46PM 5 BRACKET, EMPLOYEE, BRACKET, TITLE, BRACKET, ORGANIZATION, AT,

01:46PM 6 BRACKET, AGENCY.

01:46PM 7 AND THE LANGUAGE IN THIS TEMPLATE SAYS, "BASED ON THE OPM

01:46PM 8 GUIDANCE REFERENCED ABOVE, THE AGENCY FINDS BASED ON YOUR

01:46PM 9 PERFORMANCE THAT YOU HAVE NOT DEMONSTRATED THAT YOUR FURTHER

01:46PM 10 EMPLOYMENT AT THE AGENCY WOULD BE IN THE PUBLIC INTEREST."

01:46PM 11 THIS IS THE DOCUMENT THAT OPM GAVE TO EVERY AGENCY AND

01:46PM 12 REQUIRED -- AND ORDERED THEM TO USE. THAT ACTION BY OPM WAS

01:46PM 13 NOT AUTHORIZED BY ANY STATUTE, EXCEEDS THEIR STATUTORY

01:46PM 14 AUTHORITY, INTRUDES ON THE STATUTORY AUTHORITY OF EVERY AGENCY,

01:46PM 15 AND IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE APA, JUST

01:46PM 16 TO NAME A FEW OF THE LAWS THAT THIS VIOLATES, YOUR HONOR.

01:47PM 17 I COUNT SIX WAYS THAT OPM HAS VIOLATED THE LAW HERE.

01:47PM 18 SO FIRST, OPM IS AUTHORIZING STATUTES, THE STATUTES THAT

01:47PM 19 GIVE EMPLOYMENT AUTHORIZATION ONLY BY CONGRESS TO THE AGENCIES.

01:47PM 20 THERE ARE HUNDREDS OF THOSE STATUTES, YOUR HONOR.

01:47PM 21 THEN THERE'S THE CSRA PROTECTIONS FOR THE PROBATIONARY

01:47PM 22 EMPLOYEES.

01:47PM 23 THE COURT: THAT MEANS WHAT, CIVIL SERVICE?

01:47PM 24 MS. LEONARD: THE CIVIL SERVICE REFORM ACT OF 1978,

01:47PM 25 CORRECT.

01:47PM 1 THE RIF STATUTE, WHICH IS PART OF THE CSRA, THE REDUCTION  
01:47PM 2 IN FORCE. IF THEY'RE GOING TO REDUCE THE SIZE OF THE FEDERAL  
01:47PM 3 GOVERNMENT FOR REASONS THAT RELATE TO -- THAT ARE UNRELATED TO  
01:47PM 4 PERFORMANCE, YOU NEED TO USE A RIF.

01:47PM 5 THE APA, ARBITRARY AND CAPRICIOUS. THE APA REQUIREMENTS  
01:47PM 6 FOR RULE MAKING. THIS ACTION BY OPM IS A RULE. IN FACT, THE  
01:47PM 7 FEBRUARY 14TH -- THEY DON'T DENY IT. THE GOVERNMENT DOESN'T  
01:48PM 8 DENY IT. THEY DON'T ARGUE OTHERWISE. THIS IS A RULE. IT  
01:48PM 9 CHANGES RIGHTS AND OBLIGATIONS.

01:48PM 10 AND THE FEBRUARY 14TH EMAIL THAT WE POINTED YOU TO, IT  
01:48PM 11 SAYS WE ARE REDEFINING PERFORMANCE.

01:48PM 12 WELL, THAT IS DEFINED IN THE REGULATIONS FOR PROBATIONARY  
01:48PM 13 EMPLOYEES, AND IF YOU ARE GOING TO CHANGE LEGISLATIVELY ENACTED  
01:48PM 14 ACT NOTICE AND COMMENT RULES, THAT'S A RULE UNDER THE APA.  
01:48PM 15 THIS IS BLACK LETTER ADMINISTRATIVE LAW.

01:48PM 16 THEY HAD AT THE VERY LEAST HAD TO GO THROUGH NOTICE AND  
01:48PM 17 COMMENT. THEY DIDN'T DO THAT.

01:48PM 18 SO THAT'S SIX WAYS THAT THIS IS UNLAWFUL.

01:48PM 19 AND IF YOUR HONOR THINKS THAT THIS WHOLESALE ABDICATION  
01:48PM 20 AND IGNORING OF THE STATUTES THAT CONGRESS HAS PASSED BY THE  
01:48PM 21 ADMINISTRATION RISES TO THE CONSTITUTIONAL SEPARATION OF POWERS  
01:48PM 22 PROBLEM, IF IT'S SO FAR OUTSIDE THE BOUNDS OF OPM'S STATUTORY  
01:48PM 23 AUTHORITY, WHICH WE MAINTAIN THAT IT IS, THAT IS SEVEN,  
01:48PM 24 YOUR HONOR.

01:48PM 25 THE COURT: THAT'S WHAT?

01:48PM 1 MS. LEONARD: SEVEN WAYS THAT THEY HAVE VIOLATED THE  
01:48PM 2 LAW.

01:48PM 3 SO THIS IS VERY UNLAWFUL.

01:49PM 4 AND THE QUESTION REALLY IS, YOUR HONOR, WELL, WHAT IS TO  
01:49PM 5 BE DONE?

01:49PM 6 THE COURT: WELL, WAIT. OKAY. I DON'T WANT TO GET  
01:49PM 7 INTO THE NEXT THING. THERE ARE TOO MANY POINTS.

01:49PM 8 SO LET'S HEAR WHAT THE GOVERNMENT SAYS ON WHAT THEY  
01:49PM 9 ALLEGEDLY DID WRONG.

01:49PM 10 SO WE'LL HEAR FROM OPM NEXT, AND THEN WE'LL PICK IT UP AT  
01:49PM 11 THAT POINT LATER ON.

01:49PM 12 ALL RIGHT. LET'S GIVE OPM A CHANCE.

01:49PM 13 MR. HELLAND: THANK YOU, YOUR HONOR.

01:49PM 14 RESPECTFULLY, I THINK PLAINTIFFS ARE CONFLATING A REQUEST  
01:49PM 15 BY OPM WITH AN ORDER BY OPM, AND, UNFORTUNATELY, THAT MAKES A  
01:49PM 16 WORLD OF DIFFERENCE IN THIS CASE.

01:49PM 17 I DO WANT TO PUT A PIN IN SOME LEGAL ISSUES. I THINK  
01:49PM 18 WE'LL COME BACK TO THEM LATER, BUT THEY'RE IMPORTANT QUESTIONS  
01:49PM 19 ABOUT THIS COURT'S JURISDICTION TO EVEN RESOLVE THE DISPUTE  
01:49PM 20 PRESENTED HERE.

01:49PM 21 THE COURT: WE'RE GOING TO COME TO THAT.

01:49PM 22 MR. HELLAND: I KNOW WE'LL COME TO THAT.

01:49PM 23 THE COURT: ALL RIGHT. I WANT TO STICK WITH THE  
01:49PM 24 MERITS NOW.

01:49PM 25 MR. HELLAND: YES.

01:49PM 1 THE COURT: SO YOU'RE SLIDING OFF ONTO SOMETHING  
01:49PM 2 ELSE WHERE YOU DON'T WANT TO TALK ABOUT WHAT SHE JUST SAID.  
01:49PM 3 I WANT YOU TO TALK ABOUT HER POINT.  
01:49PM 4 MR. HELLAND: ABSOLUTELY, YOUR HONOR.  
01:50PM 5 THE COURT: AND I'LL GIVE YOU A CHANCE LATER FOR  
01:50PM 6 JURISDICTION.  
01:50PM 7 MR. HELLAND: ABSOLUTELY. THANK YOU.  
01:50PM 8 AS A FACTUAL MATTER, I AGREE THAT THE FACTUAL DISPUTE IS  
01:50PM 9 VERY IMPORTANT IN THIS CASE, AND, RESPECTFULLY, I DON'T THINK  
01:50PM 10 THAT THE RECORD SHOWS WHAT PLAINTIFFS ARE CLAIMING THAT IT  
01:50PM 11 SHOWS.  
01:50PM 12 THE DECLARATION FROM ACTING DIRECTOR EZELL SHOWS THAT HE  
01:50PM 13 ASKED AGENCIES TO UNDERTAKE A REVIEW OF THEIR PROBATIONARY  
01:50PM 14 EMPLOYEES.  
01:50PM 15 THE EMAIL THAT IS SUPPOSEDLY THE SMOKING GUN THAT YOU WERE  
01:50PM 16 JUST READ SHOWS THAT OPM ASKED AGENCIES TO PERFORM CERTAIN  
01:50PM 17 ACTIONS.  
01:50PM 18 AN ORDER IS NOT USUALLY PHRASED AS A REQUEST. ASKING IS  
01:50PM 19 NOT ORDERING TO DO SOMETHING.  
01:50PM 20 AGAIN, THAT IS THE HOUSE OF CARDS UPON WHICH THE  
01:50PM 21 PLAINTIFFS' CLAIM IS BUILT, RIGHT?  
01:50PM 22 IF OPM MERELY ASKED AGENCIES TO TAKE THEIR OWN ACTION,  
01:50PM 23 THEN I THINK ALL OF PLAINTIFFS' CLAIMS, THEY FAIL. THERE'S --  
01:50PM 24 THEIR THEORY DEPENDS ON YOU CONSTRUING THIS REQUEST AS AN  
01:51PM 25 ORDER.

01:51PM 1 I DON'T THINK ALSO THAT THE CONGRESSIONAL TESTIMONY OR THE  
01:51PM 2 OTHER FORMS OF EVIDENCE THAT PLAINTIFFS HAVE SUBMITTED SHOWS  
01:51PM 3 THAT IT WAS AN ORDER INSTEAD OF A REQUEST.  
01:51PM 4 YOU HAVE OFFICIALS FROM THE AGENCIES SAYING THAT THEY WERE  
01:51PM 5 ASKED BY OPM TO DO SOMETHING. I THINK IF YOU LOOK AT THE VA  
01:51PM 6 CONGRESSIONAL TESTIMONY THAT PLAINTIFFS HAVE REFERRED TO, EVEN  
01:51PM 7 THERE IT WAS FRAMED AS WE WERE ASKED TO DO SOMETHING.  
01:51PM 8 THE COURT: WELL, I HAVE A SUMMARY OF THAT. LET'S  
01:51PM 9 GO THROUGH THEM.  
01:51PM 10 NSF: "WE WERE DIRECTED BY OPM LAST FRIDAY TO TERMINATE  
01:51PM 11 ALL PROBATIONERS EXCEPT FOR A MINIMAL NUMBER OF MISSION  
01:51PM 12 CRITICAL PROBATIONERS." SO "DIRECTED" IS THE WORD THAT THEY  
01:51PM 13 USE.  
01:51PM 14 FURTHER DOWN, "THEY TOLD US THAT THEY DIRECTED US TO  
01:51PM 15 REMOVE PROBATIONERS. THERE WAS NO LIMITED DISCRETION. THIS IS  
01:51PM 16 NOT A DECISION THAT THE AGENCY MADE. THIS IS A DIRECTION THAT  
01:52PM 17 WE RECEIVED."  
01:52PM 18 NOW, THAT'S FROM THE NSF.  
01:52PM 19 DOD, DEPARTMENT OF DEFENSE. THIS WAS, QUOTE, "IN  
01:52PM 20 ACCORDANCE WITH DIRECTION FROM OPM ALL DOD COMPONENTS MUST  
01:52PM 21 TERMINATE THE EMPLOYMENT OF ALL INDIVIDUALS WHO ARE CURRENTLY  
01:52PM 22 SERVING A PROBATIONARY OR TRIAL PERIOD."  
01:52PM 23 THEN THE VA. THIS WAS PART OF THE CONGRESSIONAL TESTIMONY  
01:52PM 24 JUST RECENTLY. ONE OF THE CONGRESS PEOPLE SAY, "SO, NOBODY  
01:52PM 25 ORDERED YOU TO CARRY OUT THESE TERMINATIONS? YOU DID IT ON

01:52PM 1 YOUR OWN?

01:52PM 2 "WITNESS: THERE WAS DIRECTION FROM THE OFFICE OF

01:52PM 3 PERSONNEL MANAGEMENT."

01:52PM 4 I.R.S. IN A TOWN HALL CHIEF HUMAN CAPITAL OFFICER STATED,

01:53PM 5 "I'VE NEVER SEEN THIS HAPPEN BEFORE. I'M NOT SURE WHY IT'S

01:53PM 6 HAPPENING. REGARDING THE REMOVAL OF THE PROBATIONARY

01:53PM 7 EMPLOYEES, AGAIN, THAT WAS SOMETHING THAT WAS DIRECTED FROM

01:53PM 8 OPM. AND EVEN THE LETTERS THAT YOUR COLLEAGUES RECEIVED

01:53PM 9 YESTERDAY WERE LETTERS THAT WERE WRITTEN BY OPM PUT FORTH

01:53PM 10 THROUGH TREASURY AND GIVEN TO US."

01:53PM 11 AND THEN FINALLY, DEPARTMENT OF ENERGY. "PER OPM

01:53PM 12 INSTRUCTIONS, DOE FINDS THAT YOUR FURTHER EMPLOYMENT WOULD NOT

01:53PM 13 BE IN THE PUBLIC INTEREST. FOR THIS REASON, YOU'RE BEING

01:53PM 14 REMOVED FROM YOUR POSITION," ET CETERA, ET CETERA, "EFFECTIVE

01:53PM 15 TODAY."

01:53PM 16 NOW, HOW DO YOU -- WHAT DO YOU SAY TO THAT? THAT SOUNDS

01:53PM 17 LIKE A DIRECT ORDER.

01:53PM 18 MR. HELLAND: OH, I DISAGREE, YOUR HONOR. I THINK

01:53PM 19 THERE ARE MAYBE TWO BUCKETS HERE. THERE'S A BUCKET OF

01:53PM 20 STATEMENTS WHERE OFFICIALS ARE SAYING THAT THEY ACTED IN

01:53PM 21 ACCORDANCE WITH DIRECTION OR DIRECTIVE FROM OPM. THAT'S NOT

01:53PM 22 INCONSISTENT WITH OPM HAVING ISSUED A REQUEST OR EVEN GUIDANCE

01:53PM 23 FOLLOWING THAT REQUEST.

01:54PM 24 ACTING IN ACCORDANCE WITH A REQUEST IS STILL MERELY -- IT

01:54PM 25 DOESN'T CHANGE THE FACT THAT WHAT ORIGINATED WAS A REQUEST.

01:54PM 1 THE OTHER BUCKET IS STATEMENTS FROM PEOPLE WHO WE DON'T  
01:54PM 2 KNOW IF THEY WERE IN THE PHONE CALL OR WE DON'T KNOW WHO TOLD  
01:54PM 3 THEM WHAT THEY HEARD CHARACTERIZING THIS AS --  
01:54PM 4 THE COURT: WE CAN HAVE A GOOD EVIDENTIARY HEARING  
01:54PM 5 AND BRING YOUR GUY HERE, AND WE'LL BRING THESE OTHER PEOPLE  
01:54PM 6 HERE, AND I'D LIKE TO HAVE A LITTLE TRIAL ON THIS. IT WILL  
01:54PM 7 TAKE A COUPLE OF DAYS. WE CAN DO IT. AND WE'LL GET TO THE  
01:54PM 8 BOTTOM OF WHAT YOUR GUY SAID AND WHAT THESE PEOPLE HEARD ON THE  
01:54PM 9 PHONE AND THAT -- BUT RIGHT NOW WE'RE DEALING WITH THE RECORD  
01:54PM 10 THAT WE GOT.  
01:54PM 11 MR. HELLAND: EXACTLY, YOUR HONOR.  
01:54PM 12 AND AT A TRO LEVEL, WE DON'T THINK THE RECORD THEY PUT  
01:54PM 13 FORWARD QUALIFIES. IT DOESN'T GET THEM OVER THE HUMP. AGAIN,  
01:54PM 14 IT'S A HIGH BURDEN ON A TRO.  
01:54PM 15 THE GOVERNMENT'S CONFIDENT THAT IF WE DID PROCEED TO HAVE  
01:54PM 16 AN EVIDENTIARY HEARING, A MINI TRIAL, IF THE COURT WERE TO LOOK  
01:55PM 17 INTO THE UNDERLYING EVIDENCE, THE GOVERNMENT IS CONFIDENT IN  
01:55PM 18 ITS POSITION ON WHAT HAPPENED.  
01:55PM 19 THE COURT: BUT THINK ABOUT THIS, THOUGH. WE HAVE  
01:55PM 20 ALL OF THESE AGENCIES -- I THINK EVEN YOU CONCEDE THAT THE  
01:55PM 21 AGENCIES HAVE THE STATUTORY AUTHORITY TO HIRE AND FIRE, RIGHT?  
01:55PM 22 MR. HELLAND: YES.  
01:55PM 23 THE COURT: OKAY. AND OPM CANNOT DO IT FOR THEM AND  
01:55PM 24 CANNOT ORDER THEM TO DO IT, RIGHT?  
01:55PM 25 MR. HELLAND: YES.

01:55PM 1 THE COURT: SO HERE WE HAVE A SITUATION WHERE

01:55PM 2 SUDDENLY SOMETHING ABERRATIONAL HAPPENS NOT JUST IN ONE AGENCY

01:55PM 3 BUT ALL ACROSS THE GOVERNMENT, IN MANY AGENCIES, ON THE SAME

01:55PM 4 DAY, THE SAME THING.

01:55PM 5 DOESN'T THAT SOUND LIKE TO YOU THAT SOMEBODY ORDERED IT TO

01:55PM 6 HAPPEN AS OPPOSED TO, OH, WE JUST GOT GUIDANCE?

01:55PM 7 OH, JUST GOT GUIDANCE?

01:55PM 8 IT'S ALL OF THOSE THINGS HAPPENING AT ONCE THAT TENDS TO

01:56PM 9 CORROBORATE WHAT THE PLAINTIFFS ARE SAYING.

01:56PM 10 MR. HELLAND: RESPECTFULLY, I DISAGREE, YOUR HONOR.

01:56PM 11 WE DON'T DENY THAT THE ACTING DIRECTOR OF OPM ISSUED THIS

01:56PM 12 GUIDANCE TO ALL OF THESE AGENCIES.

01:56PM 13 PLAINTIFFS HAVE PUT FORWARD A STRAW MAN WHERE WE'RE TRYING

01:56PM 14 TO SAY THAT OPM HAD NO ROLE IN WHAT HAPPENED.

01:56PM 15 OPM CERTAINLY HAD A ROLE. IT ISSUED A REQUEST.

01:56PM 16 SO THE FACT THAT ALL OF THESE STARTED HAPPENING QUICKLY,

01:56PM 17 ONE AFTER THE OTHER, IT IS MERELY EVIDENCE THAT OPM DID, IN

01:56PM 18 FACT, ISSUE THE REQUEST THAT WE SAY THAT IT DID.

01:56PM 19 BUT THAT DOESN'T MEAN THAT IT'S AN ORDER, RIGHT? IT WOULD

01:56PM 20 BE STRANGE -- I'LL POINT OUT, SOME AGENCIES DID NOT, IN FACT,

01:56PM 21 TERMINATE ANY PROBATIONARY EMPLOYEES. AGENCIES FELT WILLING TO

01:56PM 22 DISREGARD THE REQUEST: THE DEPARTMENT OF JUSTICE, THE EEOC, A

01:56PM 23 NUCLEAR REGULATORY AGENCY, ALL OF THEM DID NOT TERMINATE

01:56PM 24 PROBATIONARY EMPLOYEES UNDER THIS, NOR WERE THERE ANY SORT OF

01:56PM 25 THREATENED PUNISHMENTS OR CONSEQUENCES IF AGENCIES DID NOT

01:56PM 1 FOLLOW THROUGH ON THE REQUEST THAT WAS MADE OF THEM BY OPM.

01:57PM 2 THE COURT: WELL, THE HEAD OF THE AGENCY COULD BE

01:57PM 3 REPLACED IF THEY DIDN'T. ISN'T THAT THE UNDERLYING?

01:57PM 4 MR. HELLAND: BUT THERE'S NO EVIDENCE THAT THAT WAS

01:57PM 5 THREATENED FOR ANY HEADS OF AGENCIES.

01:57PM 6 THE COURT: NOT YET, NOT YET. BUT A LOT OF PEOPLE

01:57PM 7 HAVE BEEN TERMINATED QUICKLY IN THE -- RECENTLY, AND SO IT'S

01:57PM 8 PRETTY EASY TO TERMINATE AN AGENCY HEAD, AT LEAST THOSE SUBJECT

01:57PM 9 TO THE SERVICE CONSIDERATION OF THE PRESIDENT.

01:57PM 10 MR. HELLAND: IF I MAY, YOUR HONOR, IF PLAINTIFFS

01:57PM 11 WANT TO PUT FORWARD EVIDENCE AT THE PRELIMINARY INJUNCTION

01:57PM 12 STAGE SAYING THAT, IN FACT, THE HEADS OF THESE AGENCIES WERE

01:57PM 13 THREATENED WITH TERMINATION THEMSELVES, THEY ARE FREE TO TRY TO

01:57PM 14 MARSHAL THAT EVIDENCE. I DON'T THINK IT EXISTS, AND THEY

01:57PM 15 HAVEN'T PUT IT FORWARD AT THE TRO STAGE, WHICH IS WHERE WE ARE

01:57PM 16 NOW, OF COURSE.

01:57PM 17 THE COURT: WELL, HOW COULD IT BE THAT THEY ALL

01:57PM 18 THOUGHT THAT THEY WERE DIRECTED TO DO THIS BY OPM?

01:57PM 19 MR. HELLAND: WELL, THAT GETS ME TO THE OTHER POINT,

01:57PM 20 YOUR HONOR. WE DON'T KNOW THAT THE ACTUAL HEADS OF THESE

01:57PM 21 AGENCIES DID THINK THAT THEY WERE DIRECTED.

01:57PM 22 WE HAVE STATEMENTS FROM HUMAN RESOURCES OFFICERS OR LOWER

01:58PM 23 LEVEL STAFF AT SOME OF THESE AGENCIES, WHICH FOR ALL WE KNOW

01:58PM 24 ARE MERELY CHARACTERIZING HOW SOMEONE ELSE TOLD THEM WHAT

01:58PM 25 HAPPENED.

01:58PM 1 WE DON'T KNOW THAT THEY HAVE FIRSTHAND KNOWLEDGE OF WHAT

01:58PM 2 OPM CONVEYED TO THE AGENCY HEADS ABOUT THE REQUEST THAT WAS

01:58PM 3 MADE.

01:58PM 4 THE COURT: IS THERE A RECORDING OF THIS VERBAL

01:58PM 5 CONVERSATION ON FEBRUARY 13TH?

01:58PM 6 MR. HELLAND: I AM NOT AWARE OF ONE, YOUR HONOR.

01:58PM 7 THE COURT: WELL, HOW COME IT WAS VERBAL? HOW COME

01:58PM 8 THERE WAS NO WRITTEN RECORD OF IT?

01:58PM 9 MR. HELLAND: WELL --

01:58PM 10 THE COURT: THERE'S A THING CALLED THE AGENCY

01:58PM 11 ADMINISTRATIVE RECORD.

01:58PM 12 MR. HELLAND: AND, YOUR HONOR, I'M NOT SAYING THAT

01:58PM 13 THERE WASN'T. I TRULY JUST DO NOT KNOW THE ANSWER TO THAT.

01:58PM 14 THERE WAS, OF COURSE, THE FEBRUARY 14TH FOLLOW-UP EMAIL

01:58PM 15 AND SO THAT SETS FORTH -- AND I BELIEVE IT'S SUPPOSED TO

01:58PM 16 SUMMARIZE THE GUIDANCE COMING OUT OF THAT CALL THE DAY BEFORE.

01:58PM 17 SO THERE IS THAT WRITTEN RECORD. AND --

01:58PM 18 THE COURT: WELL, THERE COULD HAVE BEEN OTHER THINGS

01:58PM 19 SAID IN THE VERBAL PART THAT JUST MADE THE MEMO ICING ON THE

01:58PM 20 CAKE. IT WOULD BE INTERESTING TO KNOW WHO WAS IN THAT CALL AND

01:58PM 21 WHAT THEY REMEMBER BEING SAID.

01:59PM 22 OKAY. SO YOUR BASIC POINT IS ALL RIGHT, THE AGENCY DOES

01:59PM 23 HAVE THE STATUTORY AUTHORITY, OPM, TO GIVE GUIDANCE, TRUE.

01:59PM 24 THAT'S TRUE.

01:59PM 25 AND IT CAN'T DIRECT AN ORDER, BUT IT CAN GIVE GUIDANCE

01:59PM 1 AND -- SO THE OTHER SIDE SAYS THAT YOU CAN'T JUST TERMINATE  
01:59PM 2 PROBATIONARY EMPLOYEES, AN AGENCY CAN'T DO THAT UNLESS THERE'S  
01:59PM 3 A RIF.

01:59PM 4 AND THEN YOU HAVE TO GO THROUGH THE RIF PROCEDURES.

01:59PM 5 AND THAT THIS AMOUNTS TO A RIF. WHAT DO YOU -- A  
01:59PM 6 REDUCTION IN FORCE. WHAT DO YOU SAY TO THAT?

02:00PM 7 MR. HELLAND: SO I DON'T BELIEVE THAT THESE WERE  
02:00PM 8 REDUCTIONS IN FORCE, YOUR HONOR. A RIF ELIMINATES POSITIONS,  
02:00PM 9 IT DOESN'T TERMINATE EMPLOYEES.

02:00PM 10 IT IS TRUE THAT THE EXECUTIVE ORDER DIRECTED AGENCIES TO  
02:00PM 11 BEGIN MAKING PREPARATIONS FOR RIFS. SO THE IDEA THAT DOWN THE  
02:00PM 12 ROAD THERE MAY BE RIFS, BUT RIFS DID NOT HAPPEN -- AS FAR AS I  
02:00PM 13 UNDERSTAND, THE POSITIONS WHICH THESE PROBATIONARY EMPLOYEES  
02:00PM 14 OCCUPIED STILL EXIST, THEREFORE, THEY HAVEN'T BEEN ELIMINATED  
02:00PM 15 PURSUANT TO A RIF.

02:00PM 16 RATHER WHAT HAPPENED WAS PROBATIONARY EMPLOYEES WERE  
02:00PM 17 TERMINATED. SO THAT IS, EMPLOYEES WERE TERMINATED, NOT  
02:00PM 18 POSITIONS TERMINATED. AND THAT MAKES THE DIFFERENCE FOR  
02:00PM 19 WHETHER THE RULES OF A RIF APPLY.

02:00PM 20 THE COURT: ALL RIGHT. I DON'T WANT -- I WANT TO  
02:00PM 21 MAKE SURE THAT YOU HAVE A FULL OPPORTUNITY TO REPLY TO  
02:00PM 22 EVERYTHING THAT HAS JUST BEEN SAID ON THIS SUBJECT OF WHAT  
02:00PM 23 HAPPENED ON THE FACTS AND WE STILL HAVE OTHER ISSUES TO COME  
02:00PM 24 TO.

02:00PM 25 BUT HAVE YOU SAID EVERYTHING THAT YOU WANT TO SAY ON THAT

02:01PM 1 POINT?

02:01PM 2 MR. HELLAND: YES, YOUR HONOR. I WOULD JUST, AGAIN,

02:01PM 3 EMPHASIZE THAT NOT EVERY AGENCY DID IN FACT TERMINATE

02:01PM 4 PROBATIONARY EMPLOYEES. AND I THINK IF YOU TAKE A CLOSE LOOK

02:01PM 5 AT THE STATEMENTS THAT THE PLAINTIFFS HAVE PUT FORWARD, IT'S

02:01PM 6 EITHER NOT FROM PEOPLE THAT THEY HAVE SHOWN WERE IN THE ROOM,

02:01PM 7 AND, THEREFORE, HEARD WHAT HAPPENED OR THEY'RE ACTUALLY ONLY

02:01PM 8 SAYING THAT OPM ASKED US TO DO THIS. THEY DIDN'T ORDER US TO

02:01PM 9 DO THIS.

02:01PM 10 THE COURT: ALL RIGHT. LET'S HEAR WHAT YOUR

02:01PM 11 REBUTTAL IS TO THE THOSE TWO POINTS.

02:01PM 12 MS. LEONARD: SO COUNSEL FOR THE GOVERNMENT IS

02:01PM 13 MAKING FACTUAL ASSERTIONS THAT THERE IS ABSOLUTELY NO RECORD

02:01PM 14 EVIDENCE THAT THEY HAVE PRESENTED TO THIS COURT TO SUPPORT.

02:01PM 15 SO THE IDEA THAT NO AGENCIES FIRED PROBATIONARY EMPLOYEES,

02:01PM 16 THEY HAVE NOT GIVEN YOU THAT INFORMATION, YOUR HONOR.

02:01PM 17 THE COURT: THAT'S BECAUSE THAT'S -- I GUESS THAT'S

02:01PM 18 NOT IN THE RECORD. BUT LET'S SAY -- IS IT TRUE? DO YOU KNOW?

02:01PM 19 MS. LEONARD: WE DON'T KNOW, YOUR HONOR, BECAUSE

02:01PM 20 IT'S BEEN DONE IN SECRET, AND IT'S JUST REVEALING AGENCY BY

02:01PM 21 AGENCY.

02:01PM 22 WE HAVE HAD TO COLLECT INFORMATION AS IT IS REVEALED.

02:01PM 23 THE COURT: HE CAN AT LEAST KNOW FOR THE JUSTICE

02:02PM 24 DEPARTMENT BECAUSE HE'S IN THE JUSTICE DEPARTMENT. SO I THINK

02:02PM 25 HE WOULD KNOW ABOUT THAT JUSTICE DEPARTMENT.

02:02PM 1 MS. LEONARD: I WOULD HOPE THAT HE WAS MAKING THAT  
02:02PM 2 REPRESENTATION ACCURATELY ABOUT THE JUSTICE DEPARTMENT,  
02:02PM 3 YOUR HONOR, DESPITE THE FACT THAT THERE'S NO EVIDENCE BEFORE  
02:02PM 4 THE COURT.

02:02PM 5 I DO NOT KNOW THE ANSWER TO THAT, AND I DON'T KNOW WHETHER  
02:02PM 6 THE JUSTICE DEPARTMENT WAS EXCEPTED FROM THE ORDER.

02:02PM 7 THE COURT: WELL, LET'S ASSUME THAT IT TURNED OUT TO  
02:02PM 8 BE TRUE FOR A MOMENT, AND WE HAVE AN EVIDENTIARY HEARING AND IT  
02:02PM 9 TURNS OUT THAT THAT'S TRUE, THEN DOESN'T THAT HURT YOUR  
02:02PM 10 POSITION THAT IT WAS ACROSS THE BOARD IN THE ENTIRE -- EVERY  
02:02PM 11 AGENCY?

02:02PM 12 MS. LEONARD: NO, NOT IF OPM MADE THE DECISION TO  
02:02PM 13 GIVE THE EXCEPTION TO DOJ.

02:02PM 14 WHO MADE THE DECISION, YOUR HONOR?

02:02PM 15 WHO MADE THE DECISION ON THE EXCEPTIONS?

02:02PM 16 WHEN THE CDC SAYS WE TRIED TO SAVE PEOPLE AND THE ORDER  
02:02PM 17 COMES FROM OPM "FIRE THEM ALL."

02:02PM 18 WHEN THE NATIONAL SCIENCE FOUNDATION SAYS, "WE WERE  
02:02PM 19 ORDERED." THE QUOTE IN THE RECORD IS "ORDERED," YOUR HONOR.  
02:02PM 20 "WE WERE ORDERED TO DO THIS."

02:03PM 21 THE COURT: ALL RIGHT. THAT LEADS TO THE SECOND  
02:03PM 22 POINT. HOW DO WE KNOW THAT THE PERSON WHO SAID THAT WAS IN THE  
02:03PM 23 MEETING?

02:03PM 24 MS. LEONARD: WE DON'T NECESSARILY KNOW WHO WAS IN  
02:03PM 25 THAT MEETING, BUT THERE IS NO RECORD EVIDENCE FROM THE

02:03PM 1 GOVERNMENT EITHER THAT THESE PEOPLE WHO ARE TESTIFYING IN FRONT  
02:03PM 2 OF CONGRESS, THE HEAD, HEAD HUMAN RESOURCES PERSON AT VA, THE  
02:03PM 3 HEAD HUMAN RESOURCES -- HUMAN CAPITAL AS THEY CALL IT AT THE  
02:03PM 4 I.R.S., THE HEAD PERSON IS SAYING WE WERE ORDERED.  
02:03PM 5 WE DON'T KNOW, BUT THEY ALSO HAVEN'T PUT ANYTHING IN THE  
02:03PM 6 RECORD, YOUR HONOR, ABOUT THAT FEBRUARY 13TH CALL AT ALL. THEY  
02:03PM 7 HAVEN'T DENIED THAT IT HAPPENED. THEY HAVEN'T DENIED THAT ANY  
02:03PM 8 OF THE PEOPLE THAT WE PUT IN THE RECORD WERE THERE OR WERE  
02:03PM 9 TOLD.  
02:03PM 10 THERE'S NOT A SHRED OF EVIDENCE THAT THIS -- THAT  
02:03PM 11 COUNTERACTS WHAT THESE AGENCIES ARE SAYING.  
02:03PM 12 ARE THEY REALLY CONTENDING TO THIS COURT THAT ALL OF THESE  
02:03PM 13 FEDERAL EMPLOYEES ARE LYING, YOUR HONOR? THAT'S WHAT COUNSEL  
02:03PM 14 IS SAYING. I DON'T THINK IT'S CREDIBLE, YOUR HONOR. IT'S NOT  
02:04PM 15 CREDIBLE.  
02:04PM 16 THE COURT: WELL, NOT NECESSARILY LYING BUT  
02:04PM 17 MISTAKEN.  
02:04PM 18 MS. LEONARD: IT'S HARD TO SEE HOW THEY COULD BE  
02:04PM 19 MISTAKEN ABOUT AN ORDER TO FIRE PROBATIONARY -- ALL  
02:04PM 20 PROBATIONARY EMPLOYEES.  
02:04PM 21 THE COURT: DIRECTION I THINK IS THE WORD THAT WAS  
02:04PM 22 USUALLY USED, DIRECTION.  
02:04PM 23 MS. LEONARD: THEY WERE GIVEN DIRECTION, YOUR HONOR.  
02:04PM 24 WE FULLY EMBRACE AND SUPPORT YOUR HONOR'S IDEA OF HAVING  
02:04PM 25 AN EVIDENTIARY HEARING ON THIS, AND IF YOUR HONOR ALTERNATIVELY

02:04PM 1           WANTS TO AUTHORIZE US TO GO -- WE WILL GO GET THE DISCOVERY  
02:04PM 2           TOMORROW, YOUR HONOR. WE STAND AT THE READY TO PROVE THIS.  
02:04PM 3           THE PLAINTIFFS, BUT MORE THAN PLAINTIFFS, SHOULD KNOW,  
02:04PM 4           THIS COURT SHOULD KNOW THE TRUTH.  
02:04PM 5           THE GOVERNMENT SHOULD NOT OPERATE IN SECRECY WHEN IT COMES  
02:04PM 6           TO WHOLESALE ORDERS TO FIRE SO MANY PEOPLE.  
02:04PM 7           AND I THINK IT SHOULD BE LOOKED WITH GREAT SKEPTICISM UPON  
02:05PM 8           COUNSEL'S STATEMENT TO THIS COURT THAT THE AGENCIES MADE THESE  
02:05PM 9           DECISIONS WHEN THEY HAVE NOT PUT A SHRED OF EVIDENCE. WHY  
02:05PM 10          DON'T THEY HAVE AGENCY DECLARATIONS, YOUR HONOR? WHAT WAS IT  
02:05PM 11          THAT THEY WANTED THE AGENCIES TO SAY THAT THEY REFUSE TO SAY TO  
02:05PM 12          THIS COURT? WHY AREN'T THEY ADDRESSING THIS, YOUR HONOR?  
02:05PM 13          THE COURT: WELL, ALL RIGHT. THAT'S A GOOD POINT.  
02:05PM 14          BUT HOW MANY DAYS DID THEY HAVE TO GET THIS OPPOSITION  
02:05PM 15          TOGETHER, TWO? THREE?  
02:05PM 16          MS. LEONARD: I THINK YOUR HONOR GAVE THEM MORE --  
02:05PM 17          AS MUCH TIME AS WE HAD TO PUT THE WHOLE CASE TOGETHER.  
02:05PM 18          THE COURT: I THINK IT WAS VERY QUICK. I THINK --  
02:05PM 19          DIDN'T I SEND THE ORDER OUT ON -- WHEN WAS IT? THIS WEEK.  
02:05PM 20          MS. LEONARD: WE FILED ON SUNDAY. IT WAS THIS WEEK.  
02:05PM 21          THEY HAD TO -- TO BE FAIR, THEY HAD A SHORT PERIOD OF  
02:05PM 22          TIME, BUT THIS GOVERNMENT, WHEN THEY WANT TO FILE DECLARATIONS  
02:05PM 23          IN SUPPORT OF THEIR POSITION CAN DO IT VERY QUICKLY, WE KNOW  
02:05PM 24          THAT.  
02:05PM 25          AND THEY HAVE NOT GIVEN --

02:06PM 1 THE COURT: SO YOU HAVE EIGHT LAWYERS THERE, IF I'M  
02:06PM 2 COUNTING RIGHT, AND THERE'S JUST ONE HERE.  
02:06PM 3 MS. LEONARD: BECAUSE MAIN JUSTICE DIDN'T SEND  
02:06PM 4 ANYONE TO DEFEND THIS DECISION, YOUR HONOR, THAT'S WHY THERE'S  
02:06PM 5 ONLY ONE HERE.  
02:06PM 6 THE COURT: ARE YOU A LOCAL HERE?  
02:06PM 7 MR. HELLAND: I AM, YOUR HONOR.  
02:06PM 8 THE COURT: OKAY.  
02:06PM 9 MS. LEONARD: SO -- WHICH SAYS, SAYS A LOT.  
02:06PM 10 THE COURT: I DON'T THINK -- I DON'T KNOW ABOUT  
02:06PM 11 THAT. ALL RIGHT. LOOK, WE'VE GOT TO MOVE TO OTHER ISSUES.  
02:06PM 12 MAYBE I'LL COME BACK TO SOME OF THIS ON THE MERITS.  
02:06PM 13 MS. LEONARD: I JUST WANT TO MAKE TWO MINOR --  
02:06PM 14 THE COURT: LET'S MOVE TO THE -- OKAY. GO AHEAD AND  
02:06PM 15 MAKE YOUR TWO OTHER MINOR POINTS.  
02:06PM 16 MS. LEONARD: I JUST WANTED TO CLARIFY SOMETHING  
02:06PM 17 ABOUT WHAT WAS BEING SAID ABOUT IT'S A RIF.  
02:06PM 18 THE COURT: ABOUT WHAT?  
02:06PM 19 MS. LEONARD: IT'S A RIF AND RESPONDING TO THE  
02:06PM 20 POINTS OF WHETHER -- THERE ARE MULTIPLE WAYS, AS I EXPLAINED  
02:06PM 21 EARLIER, ABOUT THE WAY THAT THIS MASS TERMINATION ORDER FOR  
02:06PM 22 PROBATIONARY EMPLOYEES IS ILLEGAL WHETHER OR NOT IT VIOLATES  
02:06PM 23 THE RIF PROVISIONS.  
02:07PM 24 AND WE CAN HAVE A HEALTHY DEBATE ABOUT WHETHER THIS IS  
02:07PM 25 REALLY A RIF OR NOT A RIF, BUT SET ASIDE THE RIF, IT IS STILL

02:07PM 1 UNLAWFUL BECAUSE PROBATIONARY EMPLOYEES ARE SUPPOSED TO BE  
02:07PM 2 EVALUATED AND GIVEN REASONS. THE AGENCIES ARE REQUIRED TO GIVE  
02:07PM 3 THEM REASONS RELATED TO PERFORMANCE, AND THEY CANNOT LIE ABOUT  
02:07PM 4 THEM, YOUR HONOR.

02:07PM 5 SO THAT IN AND OF ITSELF IS UNLAWFUL. SETTING ASIDE  
02:07PM 6 WHETHER THIS IS ACTUALLY A RIF OR NOT A RIF, WHICH IF YOU'RE  
02:07PM 7 DOWNSIZING BECAUSE OF --

02:07PM 8 THE COURT: WELL, HELP ME. WHAT IS THE REGULATION  
02:07PM 9 THAT SAYS WHAT YOU JUST TOLD ME, OR STATUTE?

02:07PM 10 MS. LEONARD: IT IS -- THEY ARE SET FORTH -- SORRY.  
02:07PM 11 THEY ARE SET FORTH IN OUR REPLY BRIEF, AND I WILL GIVE YOU THE  
02:07PM 12 PAGE CITE.

02:07PM 13 THE COURT: HERE'S WHAT I'VE GOT, 5 C.F.R. 315.803.  
02:07PM 14 I'LL JUST READ IT OUT LOUD. "THE AGENCY SHALL UTILIZE THE  
02:07PM 15 PROBATIONARY PERIOD --" THIS IS AN OPM, I BELIEVE, REGULATION,  
02:08PM 16 BUT IT'S TALKING ABOUT AGENCIES.

02:08PM 17 "THE AGENCIES SHALL UTILIZE THE PROBATIONARY PERIOD AS  
02:08PM 18 FULLY AS POSSIBLE TO DETERMINE THE FITNESS OF THE EMPLOYEE AND  
02:08PM 19 SHALL TERMINATE HIS OR HER SERVICES DURING THE PERIOD IF THE  
02:08PM 20 EMPLOYEE FAILS TO DEMONSTRATE FULLY HIS OR HER QUALIFICATIONS  
02:08PM 21 FOR CONTINUED EMPLOYMENT." SO THAT'S A.

02:08PM 22 IS THAT THE ONE YOU'RE REFERRING TO?

02:08PM 23 MS. LEONARD: THAT IS ONE OF THEM, YOUR HONOR.  
02:08PM 24 THERE'S ALSO 804.

02:08PM 25 THE COURT: 804 I DON'T HAVE. READ IT TO ME,

02:08PM 1 PLEASE.

02:08PM 2 MS. LEONARD: 804 HAS BEEN -- I DON'T HAVE THE

02:08PM 3 LANGUAGE OF 804, BUT IT MAY TERMINATE AN EMPLOYEE FOR

02:08PM 4 INADEQUATE PERFORMANCE, BUT AS THAT HAS BEEN INTERPRETED, THEY

02:08PM 5 MUST GIVE HONEST REASONS, YOUR HONOR.

02:08PM 6 THIS IS ALL ON PAGE 7 OF OUR REPLY BRIEF WHERE WE GO

02:09PM 7 THROUGH THE AUTHORITIES AND THE INTERPRETATIONS OF THOSE

02:09PM 8 AUTHORITIES.

02:09PM 9 THE COURT: ALL RIGHT. I DON'T HAVE THAT HERE IN

02:09PM 10 FRONT OF ME, BUT OKAY. ALL RIGHT.

02:09PM 11 MS. LEONARD: THERE'S ALSO 5 U.S.C. 2301 WHICH SAYS,

02:09PM 12 "ALL EMPLOYEES ARE TO BE RETAINED ON THE BASIS OF THE ADEQUACY

02:09PM 13 OF THEIR PERFORMANCE."

02:09PM 14 THAT'S THE CSRA FROM WHICH THE PROBATIONARY EMPLOYEES

02:09PM 15 REGULATIONS, WHICH ARE NOTICE AND COMMENT APPROVED RULES FROM

02:09PM 16 OPM, THAT ARE BEING CHANGED BY THE AGENCY NOW WITHOUT GOING

02:09PM 17 THROUGH NOTICE AND COMMENT.

02:09PM 18 THAT IS THE STATUTORY PROVISION FROM WHICH THAT FLOWS. SO

02:09PM 19 THIS IS ALL ON PAGE 7 OF OUR BRIEF.

02:09PM 20 SO MY POINT, YOUR HONOR, WAS SIMPLY THAT WE CAN GET INTO

02:09PM 21 WHETHER THIS WAS SUPPOSED TO BE A RIF OR WHETHER IT WAS A RIF,

02:09PM 22 BUT EVEN SETTING ASIDE THAT, THAT IT WAS UNLAWFUL.

02:09PM 23 IF YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE

02:09PM 24 LEGALITY.

02:09PM 25 THE COURT: WELL, I WANT TO GIVE THE OTHER SIDE --

02:10PM 1 DO YOU WANT TO RESPOND TO ANYTHING THAT I JUST HEARD? IF NOT,  
02:10PM 2 WE'RE GOING TO GO TO A NEW POINT. BUT IF YOU DO -- SHE DID  
02:10PM 3 MORE THAN REBUTTAL. SHE MADE NEW POINTS.

02:10PM 4 SO DO YOU HAVE ANYTHING YOU WANT TO ADD?

02:10PM 5 MR. HELLAND: WELL, YOUR HONOR, I THINK THE ONLY  
02:10PM 6 POINTS I WOULD SAY IN RESPONSE TO THAT MIGHT ANTICIPATE WHERE  
02:10PM 7 YOU'RE GOING NEXT, WHICH IS THE JURISDICTIONAL QUESTIONS.

02:10PM 8 THE COURT: ALL RIGHT. LET'S GO TO JURISDICTION.

02:10PM 9 WHY DON'T YOU MAKE THE JURISDICTIONAL ARGUMENT, AND THEN  
02:10PM 10 WE'LL LET THE OTHER SIDE RESPOND.

02:10PM 11 MR. HELLAND: YES. THANK YOU, YOUR HONOR.

02:10PM 12 WE PRESENTED SEVERAL JURISDICTIONAL ARGUMENTS IN OUR  
02:10PM 13 PAPERS, BUT I THINK THE ONE THAT IS PERHAPS MOST STRAIGHT  
02:10PM 14 FORWARD FOR THE COURT TO CONSIDER IS THE FACT THAT THESE TYPES  
02:10PM 15 OF CLAIMS NEED TO BE CHANNELED THROUGH CERTAIN ADMINISTRATIVE  
02:10PM 16 REVIEW PROCESSES.

02:10PM 17 THERE'S A LONG AND NEARLY UNBROKEN LINE OF CASES HOLDING  
02:10PM 18 THAT WHEN FEDERAL EMPLOYEES OR ORGANIZATIONS REPRESENTING  
02:10PM 19 FEDERAL EMPLOYEES ARE CHALLENGING THESE KINDS OF PERSONNEL  
02:10PM 20 ACTIONS, THOSE CLAIMS NEED TO GO EITHER TO THE MERITS SYSTEMS  
02:11PM 21 PROTECTION BOARD, THE MSPB, OR THE FLRA IN THE CASE OF UNION  
02:11PM 22 CLAIMANTS.

02:11PM 23 I WOULD REFER YOUR HONOR -- THESE CASES ARE IN OUR PAPERS,  
02:11PM 24 BUT THE AFGE V. TRUMP CASE OUT OF THE D.C. CIRCUIT FROM 2019  
02:11PM 25 AND SEVERAL RECENT DISTRICT COURT DECISIONS, TWO FROM THE

02:11PM 1 DISTRICT OF COLUMBIA AND ONE FROM THE DISTRICT OF MASSACHUSETTS  
02:11PM 2 MADE IN THE LAST COUPLE OF WEEKS THAT ADDRESS VERY SIMILAR  
02:11PM 3 CLAIMS, SOMETIMES VIRTUALLY IDENTICAL CLAIMS BY VERY SIMILAR  
02:11PM 4 PLAINTIFFS, SOMETIMES LITERALLY THE SAME PLAINTIFFS, WHERE THE  
02:11PM 5 COURTS IN THOSE CASES HELD THOSE CLAIMS NEED TO GO THROUGH THE  
02:11PM 6 ADMINISTRATIVE REVIEW PROCESS.

02:11PM 7 THE COURT: WHAT WOULD BE THE ADMINISTRATIVE -- I  
02:11PM 8 KNOW IT'S A MERITS SYSTEMS PROTECTION BOARD, RIGHT?

02:11PM 9 MR. HELLAND: YEAH.

02:11PM 10 THE COURT: ALL RIGHT. SO HOW WOULD THAT WORK? HOW  
02:11PM 11 WOULD THE CLAIM BE PROCESSED?

02:11PM 12 MR. HELLAND: THERE'S MULTIPLE WAYS THAT IT COULD  
02:11PM 13 BE, YOUR HONOR.

02:11PM 14 SO INDIVIDUAL EMPLOYEES CAN PETITION TO THE MERITS SYSTEM  
02:11PM 15 PROTECTION BOARD. THEY CAN ALSO ASK FOR HELP FROM THE OFFICE  
02:12PM 16 OF SPECIAL COUNSEL.

02:12PM 17 NOW, OUR DECLARATION WITH OUR OPPOSITION PRESENTED THE  
02:12PM 18 COURT WITH AN EXAMPLE WHERE SIX EMPLOYEES, VERY RECENTLY, WENT  
02:12PM 19 THROUGH THE OSC PROCESS AND OBTAINED A STAY OF THEIR  
02:12PM 20 TERMINATIONS.

02:12PM 21 THE COURT: BY THE?

02:12PM 22 MR. HELLAND: BY THE MERITS SYSTEMS PROTECTION  
02:12PM 23 BOARD.

02:12PM 24 SO THE OSC -- EVEN IF A CERTAIN EMPLOYEE DOESN'T HAVE THE  
02:12PM 25 ABILITY TO PETITION THE MSPB DIRECTLY, THEY CAN ASK FOR HELP

02:12PM 1 FROM THE OSC. THEY CAN ASK THE OSC TO INVESTIGATE A CLAIM.

02:12PM 2 THE OSC CAN THEN ASK THE MSPB TO STAY THE TERMINATION FOR TIME

02:12PM 3 FOR FURTHER INVESTIGATION AND CAN THEN SEEK FURTHER RELIEF

02:12PM 4 RELATED TO THOSE, AND THAT'S WHAT HAPPENED.

02:12PM 5 THE COURT: THAT AROSE RIGHT OUT OF THIS VERY, THIS

02:12PM 6 ACTION THAT WE'RE CONCERNED WITH?

02:12PM 7 MR. HELLAND: EXACTLY, EXACTLY, YOUR HONOR. IT

02:12PM 8 SHOWS THAT THERE IS AN ALTERNATIVE SYSTEM WHERE THE AFFECTED

02:12PM 9 EMPLOYEES CAN SEEK RELIEF.

02:12PM 10 THE OTHER ADMINISTRATIVE PROCESS IS THE FLRA THAT IS

02:12PM 11 DESIGNED TO LET UNIONS BRING CERTAIN KINDS OF GRIEVANCES AND

02:12PM 12 IT'S ONE AS FAR AS I'M AWARE THAT THE UNION PLAINTIFFS HERE CAN

02:13PM 13 CERTAINLY MAKE USE OF.

02:13PM 14 SO AGAIN, IN THIS LINE OF CASES, AFGE VERSUS TRUMP, THE

02:13PM 15 THREE RECENT DISTRICT COURT DECISIONS, VERY SIMILAR CLAIMS HAVE

02:13PM 16 BEEN HELD CHANNELLED THROUGH THOSE ADMINISTRATIVE PROCESSES.

02:13PM 17 NOT ONLY THAT, BUT DISTRICT COURTS SUCH AS THIS ONE DO NOT

02:13PM 18 HAVE JURISDICTION TO ADDRESS THE CLAIMS. CONGRESS HAS EXCLUDED

02:13PM 19 FROM THIS COURT'S JURISDICTION THE KINDS OF CLAIMS COVERED BY

02:13PM 20 THE CSRA. NOTABLY, YOUR HONOR, PLAINTIFFS' REPLY BRIEFS ASK

02:13PM 21 NOT ADDRESS THOSE RECENT DISTRICT COURT DECISIONS AT ALL. IT'S

02:13PM 22 COMPLETELY SILENT ON THEM EVEN THOUGH THEY ARE VERY, VERY

02:13PM 23 ANALOGOUS.

02:13PM 24 WE CITED THEM IN OUR BRIEFS, BUT WE CITED THE ECF DOCKETS.

02:13PM 25 I CONFIRMED THAT THEY HAVE SINCE BEEN ON -- MADE AVAILABLE ON

02:13PM 1 WESTLAW. I'VE BROUGHT PRINTED COPIES IF YOU WOULD LIKE. I CAN  
02:13PM 2 SUBMIT THEM.

02:13PM 3 BUT THE IMPORTANT POINT IS THAT PLAINTIFFS IGNORED THEM.

02:13PM 4 THEIR CHOICE IN RESPONDING TO THEM IS TO SIMPLY IGNORE THEM.

02:13PM 5 THEY DO RESPOND TO THE 2019 D.C. DISTRICT COURT DECISION,

02:14PM 6 AFGE V. TRUMP, BUT THEIR RESPONSE IS ENTIRELY UNPERSUASIVE.

02:14PM 7 THEY TRY TO SAY THAT THE REASON THAT THAT CASE DOESN'T  
02:14PM 8 APPLY IS, FIRST, THAT IT'S OUT OF CIRCUIT, AND, SECOND, THAT  
02:14PM 9 APA CLAIMS WERE NOT PRESENTED IN THIS CASE.

02:14PM 10 WELL, FIRST OF ALL, IT MAKES SENSE THAT IT WAS OUT OF  
02:14PM 11 CIRCUIT BECAUSE BY THEIR NATURE, THESE KINDS OF CLAIMS OFTEN GO  
02:14PM 12 UP THROUGH THE COURTS IN D.C. THERE'S HARDLY ANY IN-CIRCUIT  
02:14PM 13 AUTHORITY. AND THE ONE CASE, OF COURSE, THE COURT IS AWARE OF  
02:14PM 14 IS THE VEIT CASE IN THE NINTH CIRCUIT WHICH HOLDS FOR THE  
02:14PM 15 GOVERNMENT ON THIS CASE. THE EMPLOYEES' CLAIMS THERE WERE HELD  
02:14PM 16 CHANNELLED INTO THE PROCESS.

02:14PM 17 SO SETTING THAT ASIDE, LOOKING AT THE AFGE VERSUS TRUMP  
02:14PM 18 CASE, THEIR OTHER ARGUMENT IS THAT IT DIDN'T INVOLVE APA  
02:14PM 19 CLAIMS, BUT IT HAD AN EXTENDED DISCUSSION --

02:14PM 20 THE COURT: WHAT DIDN'T INVOLVE?

02:14PM 21 MR. HELLAND: THE CLAIMS IN THAT SPECIFIC CASE, THE  
02:14PM 22 AFGE VERSUS TRUMP CASE. I BELIEVE THAT --

02:14PM 23 THE COURT: DID OR DID NOT INCLUDE?

02:14PM 24 MR. HELLAND: DID NOT.

02:14PM 25 THE COURT: OKAY.

02:14PM 1 MR. HELLAND: NOW, CONSTITUTIONAL CLAIMS WERE  
02:14PM 2 PRESENTED THERE JUST AS PLAINTIFFS HERE PRESENT CONSTITUTIONAL  
02:15PM 3 CLAIMS, AND THOSE WERE HELD CHANNELLED THROUGH THE  
02:15PM 4 ADMINISTRATIVE REVIEW PROCESS.

02:15PM 5 BUT TO PLAINTIFFS' POINT, THE ONE ARGUMENT THAT THEY DO  
02:15PM 6 MAKE IN RESPONDING TO THAT CASE, THAT CASE DID DISCUSS OTHER  
02:15PM 7 CASES THAT INVOLVED APA CLAIMS, IN FACT, ALSO INVOLVING THE  
02:15PM 8 SAME PLAINTIFFS.

02:15PM 9 THE AFGE VERSUS SECRETARY OF THE AIR FORCE CASE FROM A FEW  
02:15PM 10 YEARS EARLIER, APA CLAIMS WERE PRESENTED IN THAT CASE. AGAIN,  
02:15PM 11 WE CITED IT IN OUR PAPERS. AND THE CLAIMS THERE, AGAIN, WERE  
02:15PM 12 HELD CHANNELLED THROUGH THE ADMINISTRATIVE PROCESSES POST  
02:15PM 13 DATING THE AFGE VERSUS TRUMP CASE.

02:15PM 14 THE FEDERAL LAW EMPLOYMENT OFFICERS CASE, ALSO OUT OF THE  
02:15PM 15 D.C. CIRCUIT, THAT ONE ALSO INCLUDED APA CLAIMS, AND THEY WERE  
02:15PM 16 ALSO HELD CHANNELLED THROUGH THE ADMINISTRATIVE PROCESSES.

02:15PM 17 SO THE ONLY RESPONSE THAT PLAINTIFFS HAVE PUT FORWARD FOR  
02:15PM 18 WHY AFGE VERSUS TRUMP IS UNPERSUASIVE IS REFUTED BY THE  
02:15PM 19 DISCUSSION IN AFGE VERSUS TRUMP ITSELF, WHICH AGAIN TOUCHED ON  
02:15PM 20 APA, THE APA CASES THAT I JUST MENTIONED AND BY THOSE OTHER  
02:16PM 21 CASES.

02:16PM 22 AND MOST, I THINK, ACUTELY, IT'S REFUTED BY THREE RECENT  
02:16PM 23 DISTRICT COURT DECISIONS THAT HAVE REFUSED TO ISSUE TRO'S AND  
02:16PM 24 HAVE HELD THAT THESE EXACT KIND OF CLAIMS NEED TO BE CHANNELLED  
02:16PM 25 THROUGH THE ADMINISTRATIVE PROCESSES.

02:16PM 1 IT'S REMARKABLY TELLING TO ME THAT WE DISCUSSED THESE  
02:16PM 2 CASES IN OUR PAPERS AND PLAINTIFFS DO NOT EVEN MENTION THEM,  
02:16PM 3 EVEN THOUGH THEY ARE SO CLOSELY ANALOGOUS.

02:16PM 4 THE COURT: WELL, WHAT DO THEY SAY?

02:16PM 5 MR. HELLAND: WHAT DO THOSE CASES SAY?

02:16PM 6 THE COURT: NO, NO. WHAT DO THE PLAINTIFFS SAY IN  
02:16PM 7 THEIR BRIEF THAT -- MAYBE THIS IS YOUR CHANCE TO -- THEY MUST  
02:16PM 8 MAKE SOME ARGUMENT.

02:16PM 9 MR. HELLAND: NO, NO. I'M SURPRISED, BUT THEY DID  
02:16PM 10 NOT, YOUR HONOR. I CONTROL F'D, I LOOKED FOR IT. THEY SIMPLY  
02:16PM 11 IGNORE THESE DECISIONS THAT, YES, THEY'RE OUT OF CIRCUIT BUT --

02:16PM 12 THE COURT: WELL, DID THEY SAY THAT THE OTHER  
02:16PM 13 PLAINTIFFS, THE ORGANIZATIONAL PLAINTIFFS DO HAVE STANDING?

02:16PM 14 MR. HELLAND: I'M SORRY?

02:16PM 15 THE COURT: THERE ARE OTHER PLAINTIFFS IN THE CASE  
02:16PM 16 OTHER THAN THE UNIONS. WE HAVE FOUR OR FIVE ORGANIZATIONAL  
02:17PM 17 PLAINTIFFS LIKE NATIONAL PARKS AND THE VA AND THOSE  
02:17PM 18 ORGANIZATIONS.

02:17PM 19 THEY DID SAY SOMETHING ABOUT THOSE ORGANIZATIONS HAVE  
02:17PM 20 STANDING, RIGHT?

02:17PM 21 MR. HELLAND: THEY DID, YOUR HONOR.

02:17PM 22 THE COURT: A DIFFERENT KIND OF INJURY.

02:17PM 23 MR. HELLAND: WELL, SO -- YES, YOUR HONOR.

02:17PM 24 SO TO BE CLEAR, THEY DIDN'T MENTION THESE DECISIONS IN  
02:17PM 25 THEIR REPLY BRIEF AFTER WE HAD DISCUSSED THEM IN OUR

02:17PM 1 OPPOSITION.

02:17PM 2 THE COURT: RIGHT.

02:17PM 3 MR. HELLAND: THEY DID MENTION THEM VERY BRIEFLY IN

02:17PM 4 THEIR MOVING PAPERS, I THINK, IN THEIR MOTION. BUT THEIR

02:17PM 5 PRIMARY RESPONSE THERE WAS THE ONE THAT YOU ARE JUST MAKING

02:17PM 6 NOW, WHICH IS THAT THOSE OTHER CASES NOTED THE ABSENCE OF

02:17PM 7 NON-UNION PLAINTIFFS WHEREAS THERE ARE NON-UNION PLAINTIFFS

02:17PM 8 HERE.

02:17PM 9 THAT DOES NOT CHANGE THE OUTCOME.

02:17PM 10 WHAT MATTERS UNDER THUNDER BASIN IS WHETHER THERE'S AN

02:17PM 11 ADEQUATE FORUM FOR JUDICIAL REVIEW.

02:17PM 12 THE ADMINISTRATIVE PROCESSES PROVIDE THAT ADEQUATE FORUM

02:18PM 13 BOTH FOR THE UNIONS, FOR THE AFFECTED EMPLOYEES, AND THE FACT

02:18PM 14 THAT NON-UNION ORGANIZATIONS, WHICH HAVE AN EVEN MORE TENUOUS

02:18PM 15 CONNECTION TO THE CLAIMS OF THE EMPLOYEES AT ISSUE, DOES NOT

02:18PM 16 SOMEHOW SAVE THIS CASE OR PRESERVE JURISDICTION FOR THIS COURT.

02:18PM 17 THOSE -- SO CONGRESS HAS MADE THE DETERMINATION IN THE

02:18PM 18 CSRA THAT CERTAIN KINDS OF CLAIMS INVOLVING EMPLOYEE, FEDERAL

02:18PM 19 EMPLOYEE PERSONNEL ACTIONS NEED TO BE CHANNELLED THROUGH THE

02:18PM 20 ADMINISTRATIVE PROCESS.

02:18PM 21 THE COURT: IS THIS A TRUE STATEMENT OR NOT, THAT

02:18PM 22 EVERY SINGLE PROBATIONARY EMPLOYEE WHO WAS TERMINATED HAS A

02:18PM 23 RIGHT TO GO TO THE MERITS SYSTEMS PROTECTION BOARD?

02:18PM 24 MR. HELLAND: I BELIEVE THAT IS A NOT TRUE

02:18PM 25 STATEMENT, YOUR HONOR, BUT THEY CAN GO TO THE OSC. THEY CAN

02:18PM 1 USE THEIR OWN UNION GRIEVANCE PROCESSES TO GO TO THE FLRA.

02:18PM 2 SO THE SAME CLAIMS CAN BE MADE THROUGH THE ADMINISTRATIVE

02:18PM 3 PROCESSES, NOTWITHSTANDING THAT NOT EVERY PROBATIONARY EMPLOYEE

02:19PM 4 HAS A RIGHT TO GO DIRECTLY TO THE MSPB.

02:19PM 5 MOREOVER, YOUR HONOR, IF I MAY?

02:19PM 6 THE COURT: GO AHEAD.

02:19PM 7 MR. HELLAND: THE NON-UNION ORGANIZATIONAL

02:19PM 8 PLAINTIFFS HERE, IT'S MY UNDERSTANDING AT LEAST, THAT THEY CAN

02:19PM 9 PETITION TO INTERVENE IN MSPB PROCEEDINGS OR THEY CAN FILE AS

02:19PM 10 AMICI AS WELL, SO TO THE EXTENT THAT THEY HAVE INTEREST, THEY

02:19PM 11 CAN BE HEARD THERE.

02:19PM 12 BUT THE SUPREME COURT IN SACKETT VERSUS EPA HAS SAID THAT

02:19PM 13 THE FACT THAT CONGRESS CREATED AN ADMINISTRATIVE REVIEW

02:19PM 14 STRUCTURE THAT REQUIRES ADMINISTRATIVE EXHAUSTION FROM CERTAIN

02:19PM 15 KINDS OF PLAINTIFFS CREATES A STRONG PRESUMPTION THAT OTHER

02:19PM 16 PARTIES DO NOT HAVE THEIR OWN CLAIMS, RIGHT?

02:19PM 17 AS APPLIED HERE, THE FACT THAT CONGRESS CREATED THIS

02:19PM 18 ELABORATE SCHEME WHERE INDIVIDUAL FEDERAL EMPLOYEES OR UNIONS

02:19PM 19 EACH HAVE, YOU KNOW, VERY COMPREHENSIVE AND SPECIFIC

02:19PM 20 ADMINISTRATIVE PROCESSES TO GO TO, THAT CREATES A STRONG

02:19PM 21 PRESUMPTION THAT OTHER PLAINTIFFS, ESPECIALLY PLAINTIFFS WHOSE

02:20PM 22 CLAIMS ARE MORE TENUOUSLY CONNECTED TO THE ACTIONS AT ISSUE, DO

02:20PM 23 NOT THEMSELVES HAVE THEIR OWN STAND-ALONE CLAIMS, RIGHT?

02:20PM 24 THAT'S SACKETT VERSUS EPA.

02:20PM 25 FOR THAT PRINCIPLE SACKETT CITES BLOCK VERSUS NUTRITIONAL

02:20PM 1           INSTITUTE, I BELIEVE, SOMETHING LIKE THAT. AND THAT CASE  
02:20PM 2 INVOLVED MILK PRODUCERS WHO HAD TO GO THROUGH AN ADMINISTRATIVE  
02:20PM 3 PROCESS, AND THE SUPREME COURT HELD THAT MILK CONSUMERS DIDN'T  
02:20PM 4 HAVE THEIR OWN STAND-ALONE CLAIMS.

02:20PM 5           AS APPLIED HERE, WHAT THAT MEANS IS THE FACT THAT ANY  
02:20PM 6 NON-UNION PLAINTIFFS MAY NOT THEMSELVES BE ABLE TO DIRECTLY  
02:20PM 7 PARTICIPATE IN THESE ADMINISTRATIVE PROCESSES, THAT DOESN'T  
02:20PM 8 SAVE THEIR CLAIMS. IT WOULD BE A VERY BIZARRE RESULT IF THIS  
02:20PM 9 COURT'S JURISDICTION WERE MAINTAINED, ESPECIALLY FOR THE UNION  
02:20PM 10 PLAINTIFFS AS WELL, BUT FOR THIS COURT'S JURISDICTION TO BE  
02:20PM 11 MAINTAINED SIMPLY BECAUSE THEY'VE ADDED PARTIES WITH EVEN MORE  
02:20PM 12 TENUOUSLY CONNECTED CLAIMS.

02:20PM 13           THE COURT: ALL RIGHT. LET'S HEAR -- WHO IS GOING  
02:20PM 14 TO ARGUE FOR THIS POINT?

02:20PM 15           MS. LEONARD: I AM.

02:20PM 16           THE COURT: I THOUGHT YOU SAID SOMEONE WAS GOING TO  
02:21PM 17 ARGUE.

02:21PM 18           MS. LEONARD: MS. LEYTON IS GOING TO ARGUE STANDING  
02:21PM 19 AND HARM, YOUR HONOR.

02:21PM 20           THE COURT: WELL, THAT'S WHAT THIS IS, ISN'T IT?

02:21PM 21           MS. LEONARD: NO. THIS IS WHAT WE CALL  
02:21PM 22 ADMINISTRATIVE CHANNELLING. IT'S ONE OF THE SUBJECT MATTER  
02:21PM 23 JURISDICTION BLOCKADES THAT THEY'RE TRYING TO PREVENT THIS  
02:21PM 24 COURT FROM --

02:21PM 25           THE COURT: THAT'S OKAY. ALL RIGHT. GO AHEAD.

02:21PM 1 MS. LEONARD: SURE. THIS IS A SLEIGHT OF HAND BY  
02:21PM 2 THE GOVERNMENT, YOUR HONOR.

02:21PM 3 THEY ARE NOT TALKING ABOUT THE SAME KIND OF CLAIMS,  
02:21PM 4 THEY'RE NOT TALKING ABOUT THE SAME KIND OF PLAINTIFFS, AND  
02:21PM 5 THEY'RE NOT TALKING ABOUT THE SAME DEFENDANT.

02:21PM 6 SO FIRST I'M GOING TO START WITH THE PLAINTIFFS.

02:21PM 7 THE POINT THERE IS NO THUNDER BASIN ADMINISTRATIVE  
02:21PM 8 CHANNELLING CASE THAT HAS EVER HELD THAT A NON-EMPLOYEE OR  
02:21PM 9 NON-EMPLOYEE REPRESENTATIVE, THIRD PARTY ORGANIZATIONAL  
02:21PM 10 PLAINTIFF, WITH AN APA CLAIM, SHOULD BE SENT TO THE MSPB OR THE  
02:21PM 11 FLRA.

02:21PM 12 THAT IS SIMPLY AN INVENTION OF THE GOVERNMENT TO TRY TO  
02:21PM 13 AVOID JURISDICTION FOR THOSE PLAINTIFFS.

02:21PM 14 CONGRESS DID NOT INTEND FOR THIRD PARTIES WITH AN APA  
02:21PM 15 CLAIM CHALLENGING A GOVERNMENT WIDE POLICY TO BE SENT TO AN  
02:22PM 16 AGENCY THAT IT CREATED TO HEAR INDIVIDUAL EMPLOYEE CLAIMS  
02:22PM 17 AGAINST THEIR EMPLOYING AGENCY, YOUR HONOR. IT IS A COMPLETE  
02:22PM 18 MISREPRESENTATION OF WHAT CONGRESS INTENDED. THERE'S NOTHING  
02:22PM 19 IN THE STATUTE THAT SUPPORTS THAT.

02:22PM 20 THE STATUTE SAYS THAT THOSE PROCESSES ARE FOR INDIVIDUAL  
02:22PM 21 EMPLOYEES AGAINST THEIR EMPLOYING AGENCY.

02:22PM 22 THESE ORGANIZATIONAL PLAINTIFFS, AND WE'LL GET TO THE  
02:22PM 23 UNION PLAINTIFFS IN A MINUTE, BUT THE ORGANIZATIONAL PLAINTIFFS  
02:22PM 24 OTHER THAN THE UNIONS HAVE AN APA CLAIM, YOUR HONOR. THEY CAN  
02:22PM 25 CHALLENGE, IF WE ESTABLISH STANDING, THEY CAN CHALLENGE A

02:22PM 1 GOVERNMENT WIDE POLICY AS UNLAWFUL UNDER THE APA. THEY CAN  
02:22PM 2 CHALLENGE IT AS UNCONSTITUTIONAL. THERE IS NOTHING ABOUT THE  
02:22PM 3 CSRA OR THE LABOR LAWS THAT SENDS THEIR CLAIMS TO THOSE  
02:22PM 4 ADMINISTRATIVE AGENCIES, WHICH COULD NOT HEAR THOSE CLAIMS.  
02:22PM 5 THE GOVERNMENT IS ABSOLUTELY WRONG THAT THEY ARE NOT A PARTY  
02:22PM 6 THAT HAS THE ABILITY TO PARTICIPATE.

02:22PM 7 THE COURT: YOU'RE SAYING THE APA CLAIMS MAKE IT  
02:23PM 8 SPECIAL BECAUSE THE MERIT SYSTEMS PROTECTION BOARD CANNOT  
02:23PM 9 DECIDE AN APA CLAIM, IS THAT IT?

02:23PM 10 MS. LEONARD: SO THEY CAN'T DECIDE AN APA CLAIM  
02:23PM 11 AGAINST A NON-EMPLOYER, THAT'S RIGHT, YOUR HONOR. AND THIS IS  
02:23PM 12 AN APA CLAIM AGAINST OPM.

02:23PM 13 SO THE PLAINTIFFS, THE NON-UNION PLAINTIFFS CAN'T BRING  
02:23PM 14 THEIR CLAIMS THERE, AND THE GOVERNMENT CITES NO CASE LAW. THIS  
02:23PM 15 LATE CITATION TO SACKETT DOES NOT SUPPORT WHAT THE GOVERNMENT  
02:23PM 16 IS SAYING ABOUT THIRD PARTIES BEING CHANNELLED UNDER  
02:23PM 17 THUNDER BASIN. THAT'S NOT WHAT THAT CASE SAYS.

02:23PM 18 IN FACT, SACKETT AND THE LINE OF CASES UNDER THE APA SAY  
02:23PM 19 VERY STRONGLY THAT JUDICIAL REVIEW UNDER THE APA IS A COMMAND,  
02:23PM 20 AND THE EXCEPTIONS TO JUDICIAL REVIEW UNDER THE APA ARE VERY,  
02:23PM 21 VERY LIMITED, AND WE DO NOT IMPLY THOSE LIGHTLY.

02:23PM 22 AND WHAT THEY'RE TRYING TO DO HERE IS EXPAND THE EXCEPTION  
02:23PM 23 TO SWALLOW THE APA CLAIMS IN THIS CASE.

02:23PM 24 BUT THE PLAINTIFFS, THE NON-UNION PLAINTIFFS CAN'T BE  
02:24PM 25 CHANNELLED, THEN THE DEFENDANT IS DIFFERENT HERE. WE ARE NOT

02:24PM 1 SUING THE EMPLOYING AGENCIES BECAUSE THEY'RE NOT THE ONES WHO  
02:24PM 2 MADE THE DECISION, YOUR HONOR.

02:24PM 3 IF WE'RE RIGHT ABOUT THE FIRST POINT, OPM CANNOT BE A  
02:24PM 4 DEFENDANT IN THOSE AGENCIES PROCESSES. YOU CANNOT BRING A  
02:24PM 5 CHALLENGE TO A GOVERNMENT WIDE RULE OR POLICY CREATED BY OPM IN  
02:24PM 6 THOSE PROCESSES. THAT'S SIMPLY NOT AVAILABLE, THEREFORE, THESE  
02:24PM 7 ARE NOT THE TYPE OF CLAIMS THAT CONGRESS EVER INTENDED TO BE  
02:24PM 8 HEARD THROUGH THOSE ADMINISTRATIVE AGENCIES.

02:24PM 9 PARTICULARLY, I WANT TO MAKE A PARTICULAR POINT ABOUT THE  
02:24PM 10 PROCEDURAL APA CLAIM. NO COURT HAS CHANNELLED THAT KIND OF  
02:24PM 11 CLAIM IN THE NINTH CIRCUIT OR THE SUPREME COURT.

02:24PM 12 SO WHAT IS GOING ON HERE IS THAT THE D.C. CIRCUIT HAS  
02:24PM 13 EXPANDED THE DOCTRINE BEYOND WHERE THE SUPREME COURT AND THE  
02:24PM 14 NINTH CIRCUIT ARE.

02:24PM 15 AND THERE ARE MANY REASONS, WHICH WE PUT IN OUR BRIEF, FOR  
02:25PM 16 THIS COURT TO HOLD THE LINE AND NOT EXPAND THE DOCTRINE BEYOND  
02:25PM 17 WHERE THE NINTH CIRCUIT HAS GONE. THIS IS NOT AN INDIVIDUAL  
02:25PM 18 EMPLOYEE CASE MAKING AN AS APPLIED CHALLENGE TO AN ACTION TAKEN  
02:25PM 19 BY ITS EMPLOYER.

02:25PM 20 THIS IS A CLAIM AGAINST OPM FOR CREATING A GOVERNMENT WIDE  
02:25PM 21 UNLAWFUL POLICY ORDERING THE AGENCIES TO DO THINGS THAT HAVE --  
02:25PM 22 THE COURT: LET'S JUST SAY THAT YOU'RE RIGHT FOR A  
02:25PM 23 MOMENT AND LET'S FIGURE OUT WHERE THIS WOULD LEAD. I'M GOING  
02:25PM 24 TO THINK OUT LOUD.  
02:25PM 25 GIVE ME ONE OF YOUR ORGANIZATIONS THAT -- A NON-UNION

02:25PM 1 ORGANIZATION. TELL ME THE NAME OF ONE OF THEM.

02:25PM 2 MS. LEONARD: SO WE'VE GOT THE -- NOT ONE OF THE

02:25PM 3 UNIONS, OR ONE OF THE UNIONS?

02:25PM 4 THE COURT: NON-UNION.

02:25PM 5 MS. LEONARD: OH, SORRY. WE CAN START -- WE'VE GOT

02:26PM 6 MAIN STREET ALLIANCE OR THE COALITION TO PROTECT AMERICAS

02:26PM 7 PARKS.

02:26PM 8 THE COURT: SAY THAT AGAIN.

02:26PM 9 MS. LEONARD: AMERICAS NATIONAL PARKS.

02:26PM 10 THE COURT: WHAT IS THE ONE ABOUT THE PARKS AGAIN?

02:26PM 11 MS. LEONARD: THE COALITION TO PROTECT AMERICAS

02:26PM 12 NATIONAL PARKS.

02:26PM 13 WE CAN CALL THEM THE PARKS COALITION IF THAT'S EASIER.

02:26PM 14 THE COURT: ALL RIGHT. BUT YOU DON'T HAVE ANY

02:26PM 15 DECLARATIONS FROM THE PARK SERVICE, OR DO YOU?

02:26PM 16 MS. LEONARD: OH, WE DO. WE ABSOLUTELY DO,

02:26PM 17 YOUR HONOR.

02:26PM 18 WE HAVE DECLARATIONS FROM THE ORGANIZATION AND --

02:26PM 19 THE COURT: ABOUT PROBATIONARY EMPLOYEES?

02:26PM 20 MS. LEONARD: WE HAVE DECLARATIONS FROM THE

02:26PM 21 ORGANIZATIONS, INCLUDING THE FORMER DIRECTOR OF THE NATIONAL

02:26PM 22 PARKS, ABOUT THE IMPACT ON CERTAIN --

02:26PM 23 THE COURT: OH, I DID READ THAT.

02:26PM 24 BUT, I MEAN, DO YOU HAVE SOMETHING FROM WITHIN THE

02:26PM 25 NATIONAL PARK SERVICE SAYING THAT WE WERE ORDERED TO DO THIS?

02:26PM 1 I DON'T THINK YOU DO.

02:26PM 2 MS. LEONARD: I DON'T THINK WE HAVE THAT PUBLIC

02:26PM 3 EVIDENCE HAS BEEN MADE OF THE NATIONAL -- FROM THE CURRENT

02:27PM 4 ORGANIZATION OF THE NATIONAL PARK SERVICE IN WHICH THEY HAVE

02:27PM 5 REVEALED ANYTHING ABOUT WHETHER THEY WERE ORDERED OR NOT. I

02:27PM 6 THINK THAT'S RIGHT, YOUR HONOR.

02:27PM 7 THE COURT: ALL RIGHT. WELL, LET'S USE THEM ANYWAY.

02:27PM 8 LET'S SAY THAT WE WERE TO -- I'M NOT STICKING NOW WITH

02:27PM 9 JUST THE APA CLAIM.

02:27PM 10 IT THEN BECOMES IRRELEVANT IF THERE WAS AN ORDER UNDER THE

02:27PM 11 APA CLAIM. THE QUESTION IS WHETHER THEY SHOULD HAVE GONE

02:27PM 12 THROUGH THE RULE MAKING PROCESS.

02:27PM 13 SO WHAT WOULD BE THE RELIEF? LET'S SAY THAT THE JUDGE

02:27PM 14 AGREES WITH YOU, WHAT RELIEF DO YOU GET THAT IS ANY GOOD? THE

02:27PM 15 PEOPLE HAVE ALREADY BEEN FIRED.

02:27PM 16 SO WHAT DO WE SAY, WHAT, GO BACK AND GO THROUGH RULE

02:27PM 17 MAKING? STOP TRYING TO USE A RULE THAT HASN'T BEEN PROPERLY

02:27PM 18 ADOPTED?

02:27PM 19 WHAT WOULD BE THE FORM OF THE RELIEF?

02:27PM 20 MS. LEONARD: SO THE APA REQUIRES THE COURT TO HOLD

02:28PM 21 UNLAWFUL AND SET ASIDE ANY UNLAWFUL AGENCY ACTION, INCLUDING

02:28PM 22 UNLAWFUL RULE MAKING.

02:28PM 23 THE COURT: UNLAWFUL WHAT?

02:28PM 24 MS. LEONARD: RULE MAKING, YOUR HONOR. HOLD

02:28PM 25 UNLAWFUL AND SET ASIDE. SET ASIDE IN ITS ENTIRETY

02:28PM 1 THE COURT: SO LET'S SAY I -- WELL, LET ME -- WE'RE  
02:28PM 2 GOING TO CONFUSE OUR COURT REPORTER. TELL ME IF YOUR FINGERS  
02:28PM 3 ARE GETTING TIRED AND WE'LL TAKE A BREAK.  
02:28PM 4 SO LET'S SAY THAT I DECIDE THAT THIS DECEMBER -- SORRY,  
02:28PM 5 FEBRUARY 14TH EMAIL IS A RULE. OKAY?  
02:28PM 6 MS. LEONARD: OKAY.  
02:28PM 7 THE COURT: AND NOT ADVISORY BUT A COMMAND. SO THEN  
02:28PM 8 I SAY -- YOU SAY YOU'RE RIGHT AND I SET IT ASIDE.  
02:28PM 9 WHAT GOOD DOES THAT DO YOU?  
02:28PM 10 AND THEN I SAY, IF YOU'RE GOING TO DO THIS, YOU'VE GOT TO  
02:28PM 11 GO THROUGH THE PUBLIC RULE MAKING PROCESS.  
02:28PM 12 ALL RIGHT. SO TELL ME WHY THAT'S PRACTICAL RELIEF?  
02:28PM 13 MS. LEONARD: SO IT'S PRACTICAL RELIEF BECAUSE THE  
02:28PM 14 ORDER TO SET ASIDE IS AN ORDER TO OPM TO RESCIND THIS UNLAWFUL  
02:29PM 15 PROGRAM, YOUR HONOR.  
02:29PM 16 AND IN ORDER TO RESCIND THIS UNLAWFUL PROGRAM, THEY  
02:29PM 17 NEED --  
02:29PM 18 THE COURT: YOU'VE JUST USED A WORD. YOU'VE SLID  
02:29PM 19 OFF. AGAIN, YOU'VE GONE FROM THIS MEMO TO A PROGRAM.  
02:29PM 20 I CAN SET IT ASIDE. IF I CAN SET THIS ASIDE, I DON'T KNOW  
02:29PM 21 WHAT -- THERE'S NO PROOF OF A CONTINUING PROGRAM. THESE PEOPLE  
02:29PM 22 HAVE ALREADY BEEN TERMINATED.  
02:29PM 23 MS. LEONARD: YOUR HONOR, DOD IS GOING TO TERMINATE  
02:29PM 24 THOUSANDS OF PROBATIONARY EMPLOYEES TOMORROW, TOMORROW PURSUANT  
02:29PM 25 TO THIS OPM DIRECTIVE.

02:29PM 1 IN OUR REPLY EVIDENCE WE HAVE GIVEN YOU --

02:29PM 2 THE COURT: I DIDN'T REALIZE IT. INFORM ME ABOUT

02:29PM 3 THAT.

02:29PM 4 MS. LEONARD: THE DECLARATION OF PACE SCHWARZ TALKS

02:29PM 5 ABOUT DOD AND WHAT THEY HAVE ANNOUNCED.

02:29PM 6 THE COURT: READ IT TO ME. READ TO ME WHAT THEY

02:29PM 7 HAVE ANNOUNCED.

02:29PM 8 MS. LEONARD: THEY HAVE ANNOUNCED -- THEY HAVE

02:30PM 9 ANNOUNCED -- ONE MOMENT, YOUR HONOR.

02:30PM 10 (PAUSE IN PROCEEDINGS.)

02:30PM 11 MS. LEONARD: LOOKING FOR EXHIBIT C. THIS IS DOD.

02:30PM 12 THEY'RE TALKING ABOUT THEIR CIVILIAN EMPLOYEES, BECAUSE, OF

02:30PM 13 COURSE, THE MILITARY IS A DIFFERENT ANIMAL. BUT THE CIVILIAN

02:30PM 14 EMPLOYEES OF DOD, WHICH THERE ARE TENS OF THOUSANDS OF ALL OVER

02:30PM 15 THIS COUNTRY.

02:30PM 16 "FOR CIVILIAN POLICY COUNCIL MEMBERS." THIS IS A --

02:30PM 17 THE COURT: READ SLOWLY NOW.

02:30PM 18 MS. LEONARD: SURE.

02:30PM 19 THIS IS "IN ACCORDANCE WITH DIRECTION FROM OPM, BEGINNING

02:30PM 20 FEBRUARY 28TH, 2025, ALL DOD COMPONENTS MUST TERMINATE THE

02:30PM 21 EMPLOYMENT OF ALL INDIVIDUALS WHO ARE CURRENTLY SERVING A

02:30PM 22 PROBATIONARY OR TRIAL PERIOD. FEBRUARY 28TH."

02:30PM 23 THESE TERMINATIONS ARE ONGOING EVERY DAY, YOUR HONOR.

02:31PM 24 THEY ARE NOT ALL IN THE PAST. THIS IS AN ONGOING RULE THAT

02:31PM 25 THEY ARE CONTINUING TO ENFORCE AND APPLY.

02:31PM 1 AND TO SET ASIDE THAT, WE SAY THAT NEEDS TO BE RESCINDED  
02:31PM 2 AND THE STATUS QUO IN ORDER FOR THIS COURT TO EFFECTUATE RELIEF  
02:31PM 3 THAT IS PROVIDED UNDER THE APA GOING FORWARD TO UNWIND THE  
02:31PM 4 UNLAWFUL ACTIONS OF OPM. THAT IS WHY WE ARE ASKING NOT ONLY  
02:31PM 5 FOR THE TERMINATIONS TO BE STOPPED, YOUR HONOR, BUT ALSO FOR  
02:31PM 6 THE STATUS QUO EMPLOYMENT STATUS TO BE PUT BACK IN PLACE,  
02:31PM 7 BECAUSE OTHERWISE EVERY DAY THAT THIS GOES ON, YOUR HONOR, THE  
02:31PM 8 EFFECTS CONTINUE AND SNOWBALL.  
02:31PM 9 AND IT WILL BE IMPOSSIBLE FOR THIS COURT AT THE END OF  
02:31PM 10 THIS CASE TO ISSUE EFFECTIVE RELIEF.  
02:31PM 11 THE COURT: DOD IS NOT A PARTY. OPM IS THE ONLY  
02:31PM 12 DEFENDANT.  
02:31PM 13 SO HOW WOULD THAT WORK? I WOULD ORDER OPM TO DO WHAT?  
02:32PM 14 MS. LEONARD: OPM AND ALL OF THOSE ACTING IN  
02:32PM 15 CONCERT, YOUR HONOR.  
02:32PM 16 THE COURT: OH, COME ON.  
02:32PM 17 MS. LEONARD: THAT'S --  
02:32PM 18 THE COURT: NO, NO. THAT'S LIKE SOME KIND OF GIANT  
02:32PM 19 RICO THING. YOU SHOULD HAVE MADE SOME OF THESE PEOPLE PARTIES  
02:32PM 20 MAYBE.  
02:32PM 21 MS. LEONARD: WELL, IF YOUR HONOR BELIEVES THEY'RE  
02:32PM 22 PARTIES NECESSARY TO EFFECTUATE RELIEF, WE'RE HAPPY TO JOIN  
02:32PM 23 THEM UNDER RULE 19 TONIGHT. WE WILL JOIN, IF YOUR HONOR  
02:32PM 24 BELIEVES THAT. SO THE CLAIM IS AGAINST OPM. THE CLAIM IS  
02:32PM 25 AGAINST OPM.

02:32PM 1 OPM ENGAGED IN THE UNLAWFUL ACT.

02:32PM 2 THE COURT: LET'S STICK WITH JUST OPM. WHAT WOULD I

02:32PM 3 SAY TO OPM BY WAY OF RELIEF IF WE DID AN ORDER TODAY?

02:32PM 4 MS. LEONARD: OPM MUST RESCIND ITS ORDER TO ALL

02:32PM 5 FEDERAL AGENCIES TO FIRE ALL PROBATIONARY EMPLOYEES WITH -- AND

02:32PM 6 THEY MUST RESCIND ENFORCEMENT OF THAT ORDER BECAUSE IT IS

02:32PM 7 UNLAWFUL AND ALL OF THOSE ACTING IN CONCERT.

02:32PM 8 I KNOW YOUR HONOR IS -- THAT -- UNDER RULE 65, WE WOULD

02:33PM 9 SUBMIT THAT, WE WOULD SUBMIT THAT THAT SHOULD BE OBEYED BY THE

02:33PM 10 AGENCIES, AND IF IT IS NOT, THEN THERE'S AN ENFORCEMENT ISSUE.

02:33PM 11 BUT WE ARE VERY HAPPY, YOUR HONOR, TO -- FOR PURPOSES OF

02:33PM 12 EFFECTUATING RELIEF, BECAUSE THEY ARE THE AGENCIES WHO HAVE

02:33PM 13 IMPLEMENTED OPM'S UNLAWFUL RULE, WE CAN ADD THEM AS DEFENDANTS,

02:33PM 14 YOUR HONOR, IF IT'S NECESSARY.

02:33PM 15 THE COURT: ALL RIGHT. I WANT TO GIVE THE OTHER

02:33PM 16 SIDE A CHANCE TO RESPOND.

02:33PM 17 MR. HELLAND: THANK YOU, YOUR HONOR.

02:33PM 18 THIS POINT ABOUT HOW THESE OTHER AGENCIES ARE NOT PARTIES

02:33PM 19 IS CRITICAL. IT GOES TO AN EARLIER POINT THAT PLAINTIFFS MADE

02:33PM 20 ABOUT WHY DECLARATIONS WERE NOT SUBMITTED.

02:33PM 21 THE OTHER AGENCIES WERE NOT PARTIES. THE GOVERNMENT IN

02:33PM 22 ITS TWO DAYS TO PREPARE ITS OPPOSITION, DID NOT CONTACT OR DID

02:33PM 23 NOT WORK WITH NON-PARTIES TO PREPARE DECLARATIONS IN SUPPORT

02:33PM 24 HERE.

02:33PM 25 RELATEDLY, I THINK IT WOULD BE VERY PROBLEMATIC TO ISSUE A

02:34PM 1 TEMPORARY RESTRAINING ORDER AGAINST SOME SET OF NON-PARTIES WHO  
02:34PM 2 HAVE NOT THEMSELVES HAD A CHANCE TO REPRESENT THEIR INTERESTS.  
02:34PM 3 OPM IS THE PARTY AND OPM PREPARED ITS OPPOSITION, BUT I  
02:34PM 4 THINK IT WOULD BE PROBLEMATIC TO EXPAND THAT TO NON-PARTY  
02:34PM 5 AGENCIES.  
02:34PM 6 TO RESPOND TO A FEW POINTS THAT PLAINTIFFS MADE IN THEIR  
02:34PM 7 ARGUMENT. THE COURTS HAVE REPEATEDLY REJECTED THIS ARGUMENT,  
02:34PM 8 INCLUDING IN THE CASES THAT I MENTIONED PREVIOUSLY, THAT  
02:34PM 9 SO-CALLED SYSTEMATIC OR NATIONWIDE TYPE CLAIMS CANNOT BE  
02:34PM 10 ADEQUATELY HEARD THROUGH THE ADMINISTRATIVE PROCESSES.  
02:34PM 11 IT WAS MADE IN THE DISTRICT COURT CASES THAT I POINTED  
02:34PM 12 YOUR HONOR TO PREVIOUSLY. IT ALSO CAME UP IN THE ELGIN  
02:34PM 13 SUPREME COURT CASE, ELGIN VERSUS TREASURY WHERE I BELIEVE IT  
02:34PM 14 WAS A CLAIM AGAINST THE CONSTITUTIONALITY OF THE DRAFT. IT WAS  
02:34PM 15 A NATIONWIDE CHALLENGE, AND THAT WAS HELD TO BE IMPROPERLY  
02:34PM 16 CHANNELLED THROUGH THE ADMINISTRATIVE PROCESSES.  
02:34PM 17 I ALSO UNDERSTAND THAT THERE ARE MECHANISMS FOR CLASSWIDE  
02:34PM 18 RELIEF IN THE ADMINISTRATIVE PROCESSES. SO THIS IDEA THAT  
02:35PM 19 LARGE NUMBERS OF EMPLOYEES WON'T BE ABLE TO BE HEARD, I THINK  
02:35PM 20 IT'S BELIED BY THE REGULATIONS THAT CONTEMPLATE IT.  
02:35PM 21 THE COURT: ARE YOU SURE OF THAT OR ARE YOU SAYING  
02:35PM 22 THAT IS YOUR GUESS, CLASSWIDE RELIEF?  
02:35PM 23 MR. HELLAND: NO. IF YOU GIVE ME ONE SECOND, I  
02:35PM 24 THINK I CAN POINT YOU TO THE REGULATION.  
02:35PM 25 BUT NO. I'VE BEEN INFORMED BY AGENCY COUNSEL THAT THERE

02:35PM 1 ARE REGULATIONS THAT ALLOW FOR CLASSWIDE RELIEF IN THE MSPB  
02:35PM 2 PROCEEDINGS.

02:35PM 3 SO, AGAIN, THIS GOES TO THIS ISSUE OF SO-CALLED SYSTEM  
02:35PM 4 WIDE CLAIMS, NATIONWIDE CLAIMS NOT BEING THE TYPE THAT CAN BE  
02:35PM 5 HEARD. BUT THEY CAN AND OTHER COURTS HAVE FOUND THAT THEY CAN.  
02:35PM 6 AND, OF COURSE, EVEN IF THE AGENCIES THEMSELVES CANNOT --  
02:35PM 7 IN THE ADMINISTRATIVE PROCESSES DON'T HAVE THE FULL COMPETENCE  
02:35PM 8 TO REVIEW ALL OF THESE ISSUES, THERE IS A FURTHER APPEAL  
02:35PM 9 PROCESS TO THE COURTS OF APPEALS SUCH THAT ARTICLE III COURTS  
02:35PM 10 CAN CONSIDER THESE VERY ISSUES.

02:35PM 11 THIS IS A GROUND THAT COMES UP AGAIN AND AGAIN IN THESE  
02:35PM 12 DECISIONS HOLDING THAT SIMILAR CLAIMS ARE CHANNELLED THROUGH  
02:35PM 13 THE ADMINISTRATIVE REVIEW PROCESSES.

02:36PM 14 THOSE SAME DECISIONS, WHICH RECOGNIZE THAT ULTIMATELY  
02:36PM 15 THERE WILL BE JUDICIAL REVIEW, ALSO EXPLAIN THAT AGENCIES HAVE  
02:36PM 16 IMPORTANT ROLES TO PLAY IN THAT ADMINISTRATIVE PROCESS. THEY  
02:36PM 17 CAN CLARIFY THE FACTUAL RECORD; THEY CAN MAKE PRELIMINARY LEGAL  
02:36PM 18 RULINGS THAT, YES, WHILE SUBJECT TO FURTHER JUDICIAL REVIEW ARE  
02:36PM 19 THEMSELVES VERY HELPFUL FOR THE REVIEWING COURTS; AND, OF  
02:36PM 20 COURSE, THEY CAN MOOT ISSUES, RIGHT? OR THEY CAN DECIDE ISSUES  
02:36PM 21 IN WAYS THAT ARE NARROWER PERHAPS THAN CONSTITUTIONAL GROUNDS  
02:36PM 22 BUT ARE FAVORABLE TO THE EMPLOYEES SUCH THAT FURTHER JUDICIAL  
02:36PM 23 REVIEW ISN'T EVEN NECESSARY.

02:36PM 24 SO, AGAIN, THERE'S ALL OF THESE CONSIDERATIONS WHICH SHOW  
02:36PM 25 THAT THERE IS AN ADEQUATE REVIEW PROCESS IN THE ADMINISTRATIVE

02:36PM 1 PROCESSES HERE.

02:36PM 2 COUNSEL MADE THE POINT THAT OPM WOULD NOT BE A PROPER

02:36PM 3 DEFENDANT IN THE ADMINISTRATIVE PROCEEDINGS BECAUSE THE

02:36PM 4 AFFECTED EMPLOYEES THEMSELVES ARE GENERALLY, NOT ALWAYS, BUT

02:36PM 5 GENERALLY EMPLOYEES OF OTHER AGENCIES.

02:37PM 6 I DON'T KNOW OF ANY REASON WHY IN THOSE PROCEEDINGS, THOSE

02:37PM 7 EMPLOYEES COULDN'T STILL MAKE THE ARGUMENT THAT THEIR

02:37PM 8 TERMINATION WAS UNLAWFUL FOR REASONS THAT ALLEGEDLY STARTED

02:37PM 9 WITH OPM.

02:37PM 10 NOW, AS A FACTUAL MATTER, WE STILL MAINTAIN THAT IT WAS

02:37PM 11 MERELY A REQUEST. THERE WAS NO ORDER HERE. AND WE WOULD BE

02:37PM 12 WILLING TO STIPULATE, BY THE WAY, THAT OPM'S ACTIONS WERE NOT

02:37PM 13 BINDING, THAT THEY DID NOT ISSUE BINDING ACTIONS ON THE

02:37PM 14 AGENCIES.

02:37PM 15 BUT ALL THAT BEING SAID, I DON'T THINK THERE'S ANYTHING

02:37PM 16 PREVENTING EMPLOYEES FROM MAKING THIS ARGUMENT IN THE PROPER

02:37PM 17 ADMINISTRATIVE PROCEEDINGS SIMPLY BECAUSE AN OPM ACTION IS

02:37PM 18 SOMETHING THAT SET OFF THIS PROCESS --

02:37PM 19 THE COURT: I HAVE A SOMEWHAT RELATED QUESTION.

02:37PM 20 IS THERE ANY OTHER DISTRICT COURT DECISION OR CASE NOW

02:37PM 21 PENDING THAT RAISES THE SAME ISSUE AS THIS CASE?

02:38PM 22 MR. HELLAND: WELL, I BELIEVE THE AFGE VERSUS EZELL

02:38PM 23 CASE IN THE DISTRICT OF MASSACHUSETTS RAISED VIRTUALLY THIS

02:38PM 24 ISSUE, AND THE TRO THERE I BELIEVE WAS DENIED. IT'S ONE OF THE

02:38PM 25 CASES THAT WE'VE CITED.

02:38PM 1 I DON'T KNOW THE SUBSEQUENT STATUS OF IT, THAT IS, I DON'T  
02:38PM 2 KNOW IF APPEALS ARE UNDERWAY OR IF FURTHER BRIEFING IS  
02:38PM 3 HAPPENING THERE BUT --  
02:38PM 4 THE COURT: WELL, WHICH UNION WAS IT IN THAT CASE?  
02:38PM 5 MR. HELLAND: I BELIEVE AFGE WAS THE LEAD NAMED  
02:38PM 6 PLAINTIFF. FOR MANY OF THESE CASES THERE'S MULTIPLE UNIONS  
02:38PM 7 INVOLVED, BUT I BELIEVE AFGE, THE SAME LEAD NAMED PLAINTIFF  
02:38PM 8 HERE WAS THE NAMED PLAINTIFF.  
02:38PM 9 THE COURT: LET ME ASK THE PLAINTIFFS, ISN'T  
02:38PM 10 THERE -- IT SOUNDS LIKE JUDGE SHOPPING TO ME TO HAVE A CASE GO  
02:38PM 11 ON IN BOSTON AND ONE GOING HERE BY THE SAME PLAINTIFF  
02:38PM 12 CHALLENGING THE SAME CONDUCT.  
02:38PM 13 SO WHAT DO YOU SAY TO THAT POINT?  
02:38PM 14 MS. LEONARD: THE CASE IN THE DISTRICT COURT IN  
02:38PM 15 MASSACHUSETTS CHALLENGED THE FORK IN THE ROAD PROGRAM,  
02:38PM 16 YOUR HONOR, WHICH IS VERY DIFFERENT FROM OPM'S ORDER TO  
02:39PM 17 TERMINATE.  
02:39PM 18 THE COURT: WELL, THAT HAS NOTHING TO DO WITH  
02:39PM 19 PROBATIONARY EMPLOYEES?  
02:39PM 20 MS. LEONARD: THAT IS THE FORK IN THE ROAD PROGRAM  
02:39PM 21 THAT WAS OFFERED BY OPM TO 2 MILLION --  
02:39PM 22 THE COURT: I'M SORRY. THAT'S A DIFFERENT THING.  
02:39PM 23 OKAY.  
02:39PM 24 IS THERE ANOTHER CASE WHERE THE SAME UNION IS CHALLENGING  
02:39PM 25 THE SAME CONDUCT, THE PROBATIONARY THING?

02:39PM 1 MR. HELLAND: PERHAPS NOT THE SAME UNION,

02:39PM 2 YOUR HONOR. AND I MAY HAVE MISSPOKEN, AND I APOLOGIZE FOR

02:39PM 3 DOING SO.

02:39PM 4 I BELIEVE THE CASE I'M THINKING OF IS ACTUALLY THE NTU

02:39PM 5 CASE IN THE DISTRICT OF COLUMBIA, AND I DON'T BELIEVE THAT

02:39PM 6 THERE'S ANY OVERLAP IN THE PLAINTIFFS THERE.

02:39PM 7 MS. LEONARD: THERE IS NOT, YOUR HONOR.

02:39PM 8 THE COURT: OKAY. THEN ENOUGH ON THAT ONE.

02:39PM 9 MS. LEONARD: AND IF I MAY TO RESPOND TO COUNSEL'S

02:39PM 10 POINT ABOUT OUR NOT ADDRESSING THESE CASES AND HE WAS TALKING

02:39PM 11 ABOUT SEARCHING THE REPLY BRIEF.

02:39PM 12 THE REASON IS THEY WERE ADDRESSED IN OUR OPENING

02:39PM 13 MEMORANDUM, YOUR HONOR, ON PAGE 26. I JUST WANT TO MAKE THAT

02:39PM 14 VERY CLEAR THAT WE ARE NOT SHYING AWAY FROM THE DECISIONS THAT

02:39PM 15 CHANNELLED OTHER TYPES OF CLAIMS THAT ARE DIFFERENT FROM THIS

02:39PM 16 CASE. WE HAVE ADDRESSED THEM AND DISTINGUISHED THEM. THAT'S

02:40PM 17 IN OUR OPENING MEMORANDUM.

02:40PM 18 THE COURT: LET'S GO TO THE STANDING OF THE

02:40PM 19 ORGANIZATIONAL -- NOT THE UNIONS, BUT THE NON-UNION

02:40PM 20 ORGANIZATIONS.

02:40PM 21 MS. LEYTON: YES, YOUR HONOR.

02:40PM 22 WE HAVE A NUMBER OF ORGANIZATIONS IN THIS CASE THAT ARE

02:40PM 23 NOT UNIONS. THEIR RELATIONSHIP TO THESE ACTIONS IS NOT TENIOUS

02:40PM 24 AS COUNSEL HAS CHARACTERIZED. THERE ARE NUMEROUS VETERANS

02:40PM 25 ORGANIZATIONS, VOTE VETS AS WELL AS THE COMMON DEFENSE

02:40PM 1 ORGANIZATION; THERE ARE NUMEROUS PARKS ORGANIZATIONS AND PUBLIC  
02:40PM 2 LANDS ORGANIZATIONS, AND A SMALL BUSINESS ASSOCIATION.  
02:40PM 3 THOSE ORGANIZATIONS HAVE DEMONSTRATED IN THEIR  
02:40PM 4 DECLARATIONS EXTENSIVE AND WIDESPREAD HARM THAT IS BOTH  
02:40PM 5 ANTICIPATED AND IMMINENT AND HARM THAT HAS ACTUALLY OCCURRED.  
02:40PM 6 STARTING WITH, FOR EXAMPLE, THE VETERANS ORGANIZATIONS.  
02:41PM 7 THE DECLARATIONS SHOW THE TERMINATION OF EMPLOYEES WHO ANSWER  
02:41PM 8 PHONES AND SCHEDULE APPOINTMENTS AT THE VA HOSPITALS, WHO STAFF  
02:41PM 9 THE CRISIS LINE THAT IS AVAILABLE FOR VETERANS WHO ARE FACING  
02:41PM 10 MENTAL HEALTH CRISES WHO HAVE SUICIDAL IDEATION AND NEED TO BE  
02:41PM 11 CONNECTED WITH SERVICES, THAT ENGAGE IN ADDICTION RECOVERY  
02:41PM 12 RESEARCH, BURN PIT EXPOSURE RESEARCH, ALL SORTS OF VETERANS  
02:41PM 13 SERVICES THAT ARE CRITICAL TO THOSE ORGANIZATIONS.  
02:41PM 14 VOTE VETS, WHICH REPRESENTS 2 MILLION VETERANS AND THEIR  
02:41PM 15 FAMILIES ACROSS THE COUNTRY, HAS BEEN INUNDATED WITH CALLS FROM  
02:41PM 16 VETERANS WHO ARE EXPERIENCING THE IMPACT AND ARE CONCERNED  
02:41PM 17 ABOUT THE IMPACT, AS WELL AS REPRESENTING MANY FEDERAL  
02:41PM 18 EMPLOYEES BECAUSE 30 PERCENT OF FEDERAL EMPLOYEES ARE VETERANS  
02:41PM 19 BECAUSE OF THE PREFERENCES THEY HAVE.  
02:41PM 20 THE ENVIRONMENTAL ORGANIZATIONS HAVE DEMONSTRATED HARMS TO  
02:41PM 21 PROTECTIONS OF SPECIOUS THAT THE BUREAU OF LAND MANAGEMENT IS  
02:42PM 22 NO LONGER RESPONDING TO A FREEDOM OF INFORMATION ACT REQUEST;  
02:42PM 23 THAT THE TOADS AND THE FISH THAT ARE PROTECTED BY ENVIRONMENTAL  
02:42PM 24 STATUTES WILL NO LONGER BE PROTECTED; THAT JOSHUA TREE WAS NOT  
02:42PM 25 OPEN BECAUSE THERE WAS INADEQUATE STAFFING UP AT THE HATCHERY

02:42PM 1 THAT PROTECTS THE TOADS HAS LOST THEIR SUPERVISOR. ALL SORTS  
02:42PM 2 OF IMPACTS ON PUBLIC LANDS AND ON THIS COUNTRY'S NATIONAL  
02:42PM 3 RESOURCES, AND THESE ORGANIZATIONS HAVE DEMONSTRATED HARMS TO  
02:42PM 4 CRITICAL SAFETY PROJECTS:  
02:42PM 5 CIVILIAN FIREFIGHTERS ON NAVAL BASES HAVE BEEN TERMINATED;  
02:42PM 6 RESEARCH ON FIREFIGHTER SAFETY HAS BEEN LOST; FAA EMPLOYEES WHO  
02:42PM 7 ARE WORKING ON SAFETY REGULATIONS AND WHO ARE PROCESSING  
02:42PM 8 CANDIDATES FOR AIR TRAFFIC CONTROL PROGRAMS HAVE BEEN  
02:42PM 9 TERMINATED; AND 10 PERCENT OF NSF EMPLOYEES WERE LAID OFF  
02:42PM 10 TERMINATING CRITICAL MANAGERS OF NSF GRANT PROGRAMS. SO THESE  
02:42PM 11 ORGANIZATIONS HAVE DEMONSTRATED THAT THEIR MEMBERS HAVE FACED  
02:42PM 12 INJURIES AND WILL BE HARMED AS WELL AS THE DECLARATIONS FROM  
02:43PM 13 THE UNIONS DOCUMENTING THE EXTENSIVE IRREPARABLE HARM TO THEIR  
02:43PM 14 MEMBERS.  
02:43PM 15 AND I WOULD JUST LIKE TO ADD, YOUR HONOR, THAT THE  
02:43PM 16 AGENCIES THAT ARE NOT CURRENTLY PARTIES BUT COULD BE ADDED AS  
02:43PM 17 RULE 19 PARTIES IMPLEMENTED THE ORDER THAT OPM ISSUED THAT WAS  
02:43PM 18 UNLAWFUL.  
02:43PM 19 OUR CLAIM OF UNLAWFULNESS IS NOT ONLY PREDICATED ON OPM'S  
02:43PM 20 ROLE OF OVERRIDING THE HEADS OF THE AGENCIES BUT IS ALSO  
02:43PM 21 PREDICATED ON THE FACT THAT OPM INSTRUCTED THE AGENCIES TO DO  
02:43PM 22 SOMETHING THAT WAS INDEPENDENTLY UNLAWFUL BECAUSE THEY TOLD THE  
02:43PM 23 AGENCIES TO SAY THAT THESE EMPLOYEES WERE BEING FIRED FOR  
02:43PM 24 PERFORMANCE REASONS, SOMETHING THAT WILL CREATE A STAIN ON THE  
02:43PM 25 RECORD OF THESE EMPLOYEES AND HARM THEM IN THE FUTURE, EVEN

02:43PM 1 THOUGH THAT WAS NOT TRUE AND EVEN THOUGH IT IS ILLEGAL FOR THE  
02:43PM 2 AGENCIES TO DO THAT.

02:43PM 3 SO IN ORDER TO CEASE THE UNLAWFULNESS AND RESTORE THE  
02:43PM 4 STATUS QUO, IT IS NECESSARY NOT ONLY TO ENJOIN THE THOUSANDS OF  
02:43PM 5 TERMINATIONS THAT WE KNOW ARE SCHEDULED FOR TOMORROW, THE  
02:44PM 6 THOUSANDS OF TERMINATIONS THAT MAY BE SCHEDULED FOR TOMORROW  
02:44PM 7 AND THE UPCOMING WEEKS, BUT ALSO TO ORDER THE AGENCIES TO -- TO  
02:44PM 8 ORDER THE OPM TO HAVE THE AGENCIES RESCIND THEIR UNLAWFUL  
02:44PM 9 IMPLEMENTATION OF THE OPM ORDER. THAT IS WHAT IS NECESSARY TO  
02:44PM 10 STOP THE ONGOING HARM TO THE ENVIRONMENT, TO VETERANS, TO THOSE  
02:44PM 11 WHO ENJOY THE NATIONAL PARKS AND PUBLIC LANDS, AND TO ALL OF  
02:44PM 12 THE IMPORTANT GOVERNMENT SERVICES THAT HAVE BEEN HARMED AND  
02:44PM 13 WILL CONTINUE TO FACE ONGOING HARM UNTIL OPM'S DIRECTIVE AND  
02:44PM 14 THE IMPLEMENTATION OF THAT DIRECTIVE IS ENJOINED.

02:44PM 15 THE COURT: OKAY. THANK YOU.

02:44PM 16 MR. HELLAND: THANK YOU, YOUR HONOR.

02:44PM 17 OUR PRIMARY RESPONSE HERE IS THE FACTUAL ONE. THERE WAS  
02:44PM 18 NOT AN ORDER HERE, THERE WAS A REQUEST. THE REQUEST WAS  
02:44PM 19 CARRIED OUT BY SOME BUT NOT ALL AGENCIES, AND IT'S THOSE  
02:44PM 20 AGENCIES INDEPENDENT INTERVENING ACTIONS THAT MORE PROXIMATELY  
02:44PM 21 CREATE THE ALLEGED HARMS THAT PLAINTIFFS ARE DESCRIBING.

02:44PM 22 SO, IN OTHER WORDS, THE CHAIN OF CAUSATION BETWEEN THE  
02:45PM 23 CHALLENGED ACTION AND THE ALLEGED HARMS IS TOO LONG TO SUPPORT  
02:45PM 24 ARTICLE III STANDING.

02:45PM 25 SEPARATELY, THERE'S THE QUESTION OF REDRESSABILITY OR THE

02:45PM 1 RELATED CHANNELLING THROUGH THE ADMINISTRATIVE PROCESSES.

02:45PM 2 WHAT PLAINTIFFS ARE SEEKING HERE, THE RELIEF THAT THEY'RE

02:45PM 3 SEEKING IS THE REINSTATEMENT OF THESE FEDERAL EMPLOYEES WHOM

02:45PM 4 PLAINTIFFS SAY ONCE REINSTATED WILL BE ABLE TO TAKE ALL OF

02:45PM 5 THESE GOVERNMENT ACTIONS AND PERFORM THESE SERVICES THAT

02:45PM 6 PLAINTIFFS SAY ARE SO IMPORTANT.

02:45PM 7 WHILE THE MECHANISM FOR DOING THAT IS GOING THROUGH THE

02:45PM 8 ADMINISTRATIVE PROCESSES BECAUSE THE REINSTATEMENT OF THOSE

02:45PM 9 FEDERAL EMPLOYEES ARE EXACTLY THE KINDS OF PERSONNEL ACTIONS

02:45PM 10 THAT CONGRESS HAS SAID NEED TO BE CHANNELLED THROUGH THOSE

02:45PM 11 PROCESSES.

02:45PM 12 THE COURT: BUT HOW COULD THE, HOW COULD THIS GROUP

02:45PM 13 THAT REPRESENTS THE PARKS, COALITION TO PROTECT AMERICA'S

02:45PM 14 NATIONAL PARKS, HOW COULD THEY GO TO THE MSPB AND LAUNCH --

02:46PM 15 THEY'RE NOT AN EMPLOYEE.

02:46PM 16 MR. HELLEND: RIGHT.

02:46PM 17 THE COURT: THEY HAVEN'T BEEN TERMINATED.

02:46PM 18 THE AGENCY WILL JUST LOOK AT THEM AND SAY YOU'RE JUST AN

02:46PM 19 INTERLOPER AND SIT ON THERE AND DO NOTHING.

02:46PM 20 I DON'T SEE HOW THE COALITION TO PROTECT AMERICAS NATIONAL

02:46PM 21 PARKS HAS ANY REMEDY AT THE MSPB.

02:46PM 22 MR. HELLAND: WELL, I THINK THE POLITE WORD FOR AN

02:46PM 23 INTERLOPER IS AN INTERVENER, AND THEY COULD PETITION TO

02:46PM 24 INTERVENE. SO THEY COULD BE HEARD OR THEY COULD ASK TO HAVE --

02:46PM 25 THE COURT: THEY CAN'T INTERVENE UNLESS THE EMPLOYEE

02:46PM 1 BRINGS A CLAIM AND A LOT OF THEM ARE JUST GOING TO SAY FORGET  
02:46PM 2 IT. THEY DON'T WANT ME, I GUESS I'M GOING TO LEAVE, AND WITH A  
02:46PM 3 STAIN ON MY RECORD.

02:46PM 4 BUT THEY'RE NOT GOING TO GO TO THE TROUBLE, A LOT OF THEM,  
02:46PM 5 SOME OF THEM WILL, AND YOU MENTIONED SIX ALREADY HAVE. BUT  
02:46PM 6 THERE ARE THOUSANDS HERE.

02:46PM 7 MR. HELLAND: WELL, SIX HAVE GONE THROUGH THE OFFICE  
02:47PM 8 OF SPECIAL COUNSEL IN A RECORDED PROCEEDING, WHICH HAS ALREADY  
02:47PM 9 RESULTED IN A STAY AND FOR WHICH WE UNDERSTAND THE SPECIAL  
02:47PM 10 COUNSEL IS EXAMINING WAYS TO EXPAND THAT TO OTHER EMPLOYEES.  
02:47PM 11 BUT HUNDREDS OF EMPLOYEES HAVE PETITIONED THE MSPB RELATED  
02:47PM 12 TO THESE ACTIONS. SO CERTAINLY AFFECTED EMPLOYEES ARE PURSUING  
02:47PM 13 THAT.

02:47PM 14 THE COURT: BUT NOT ALL, BUT NOT ALL. AND MAYBE NOT  
02:47PM 15 EVEN A MAJORITY, RIGHT?

02:47PM 16 MR. HELLAND: PERHAPS NOT A MAJORITY.

02:47PM 17 THE COURT: MAYBE JOSHUA TREE WILL HAVE TO STAY  
02:47PM 18 CLOSED.

02:47PM 19 MR. HELLAND: RIGHT, WHICH BRINGS ME BACK TO MY  
02:47PM 20 FIRST POINT. I BELIEVE THAT THAT IS JUST TOO ATTENUATED FROM  
02:47PM 21 THE CHALLENGED ACTION HERE TO SUPPORT ARTICLE III STANDING.  
02:47PM 22 YOU'RE TALKING ABOUT AN OPM REQUEST THAT GOES TO AN  
02:47PM 23 AGENCY, THE AGENCY MAKES ITS OWN REVIEW, THAT RESULTS IN  
02:47PM 24 STAFFING DECISIONS, THOSE STAFFING DECISIONS HAVE THEIR OWN  
02:47PM 25 CONSEQUENCES IN TERMS OF WHETHER JOSHUA TREE OR YOSEMITE OR ANY

02:47PM 1 NUMBER OF OTHER NATIONAL PARKS LOCATIONS CONTINUE TO RECEIVE  
02:47PM 2 STAFFING. THERE'S SO MANY LINKS IN THAT CHAIN THAT IT DOESN'T  
02:47PM 3 SUPPORT ARTICLE III STANDING FOR THIS KIND OF CLAIM.

02:48PM 4 I THINK CLAPPER IS PROBABLY THE BEST CASE ON POINT FOR  
02:48PM 5 THAT, BUT THE FUNDAMENTAL POINT REMAINS THAT YOU NEED TO HAVE A  
02:48PM 6 CLOSE CONNECTION BETWEEN THE CHALLENGED ACTION AND THE INJURY  
02:48PM 7 IN ORDER TO SUPPORT ARTICLE III STANDING AND THE VARIOUS STEPS  
02:48PM 8 THAT ARE AT ISSUE HERE ARE SIMPLY TOO MANY.

02:48PM 9 THE COURT: ANY REBUTTAL?

02:48PM 10 MS. LEYTON: YOUR HONOR, JUST ONE LEGAL POINT THAT I  
02:48PM 11 WANT TO POINT OUT, AND THIS RELATES TO WHAT MY COCOUNSEL  
02:48PM 12 ADDRESSED WITH CHANNELLING, BUT THE STATUTES REGARDING THE MSPB  
02:48PM 13 DO NOT ALLOW ORGANIZATIONS TO INTERVENE, AND THAT IS ADDRESSED  
02:48PM 14 ON PAGES 13 AND 14 OF OUR REPLY BRIEF. SO I WOULD CALL YOUR  
02:48PM 15 ATTENTION TO THAT.

02:48PM 16 I WOULD ALSO JUST POINT OUT, THIS IS CLASSIC ARTICLE III  
02:48PM 17 STANDING CLASSIC IRREPARABLE HARM, THIS KIND OF INJURY TO THE  
02:48PM 18 ABILITY TO ENJOY NATIONAL PARKS, TO GOVERNMENT SERVICES.

02:49PM 19 THERE IS NO SUPPORT FOR THE ARGUMENT THAT THESE  
02:49PM 20 ORGANIZATIONS WOULD GET CHANNELLED. THERE'S NO PRECEDENCE FOR  
02:49PM 21 THAT.

02:49PM 22 AND THE REMEDIES THAT THE EMPLOYEES COULD OBTAIN IN THAT  
02:49PM 23 PROCEEDING, BACKPAY MANY YEARS FROM NOW, WOULD IN NO WAY REMEDY  
02:49PM 24 THE IMMEDIATE AND THE IRREPARABLE INJURY THAT THESE  
02:49PM 25 ORGANIZATIONS AND THEIR MEMBERS WHO THEY STAND IN THE SHOES OF,

02:49PM 1 WHICH THE GOVERNMENT DOES NOT CONTEST, ARE FACING EVERY DAY  
02:49PM 2 THAT THESE TERMINATIONS ARE ALLOWED TO STAND.

02:49PM 3 THE COURT: ALL RIGHT. WHAT OTHER ISSUES ARE THERE  
02:49PM 4 THAT NEED TO BE ARGUED? ANYTHING MORE?

02:49PM 5 MR. HELLAND: I DON'T THINK WE HAVE OTHER ISSUES,  
02:49PM 6 YOUR HONOR.

02:49PM 7 I WOULD ASK IN CLOSING THAT YOUR HONOR TAKE A VERY CLOSE  
02:49PM 8 LOOK AT THE RECORD EVIDENCE. I'M THINKING ABOUT THE WAY I  
02:49PM 9 DESCRIBED THE BUCKETS PREVIOUSLY, BECAUSE I DON'T THINK IT  
02:49PM 10 SUPPORTS THE ORDER THAT PLAINTIFFS ARE CHARACTERIZING IT. I  
02:49PM 11 THINK IT SHOWS THAT IT WAS MERELY A REQUEST AND ASK.

02:50PM 12 AND I WOULD ALSO ENCOURAGE YOUR HONOR TO TAKE A VERY CLOSE  
02:50PM 13 LOOK TO LOOK AT THE THREE DISTRICT COURT DECISIONS THAT I'VE  
02:50PM 14 BEEN REFERRING TO AND THE AFGE V. TRUMP D.C. CIRCUIT DECISION.

02:50PM 15 THE COURT: THANK YOU.

02:50PM 16 MS. LEONARD: THANK YOU, YOUR HONOR.

02:50PM 17 I THINK I WANT TO JUST CLOSE BY COMING BACK TO THE POINT  
02:50PM 18 ABOUT THE SCOPE OF REMEDY BECAUSE THE GOVERNMENT HAS ARGUED  
02:50PM 19 THAT WE SHOULD NOT BE ENTITLED TO A REMEDY THAT COULD ACTUALLY  
02:50PM 20 ADDRESS THE PROBLEM THAT THIS CASE SEEKS TO ADDRESS, WHICH IS  
02:50PM 21 RIPPING OUT THIS UNLAWFUL RULE FROM THE ROOT AND ENJOINING ITS  
02:50PM 22 IMPLEMENTATION ACROSS THIS COUNTRY TO PREVENT THE HARMS THAT MY  
02:50PM 23 COLLEAGUE WAS ADDRESSING.

02:50PM 24 WE RECOGNIZE THAT THIS IS AN EXTRAORDINARY ASK,  
02:50PM 25 YOUR HONOR.

02:50PM 1 WE DO NOT DO THIS LIGHTLY.

02:50PM 2 BUT THESE ARE EXTRAORDINARY TIMES AND THIS IS

02:50PM 3 EXTRAORDINARY HARM.

02:50PM 4 AND ON BEHALF OF MY CLIENTS AND ALL OF THOSE SITTING IN

02:50PM 5 THIS COURTROOM WATCHING THIS CASE, BECAUSE THEY EITHER LOST

02:50PM 6 THEIR JOBS OR ARE NOT ABLE TO OBTAIN THE SERVICES FROM THE

02:50PM 7 FEDERAL GOVERNMENT THAT SHE SHOULD BE ABLE TO OBTAIN, WE ASK

02:50PM 8 THIS COURT RESPECTFULLY TO STOP THE UNLAWFUL DISMANTLING OF OUR

02:51PM 9 FEDERAL GOVERNMENT AND PUT OUR GOVERNMENT BACK TO WORK.

02:51PM 10 THE COURT: OKAY. JUST BEAR WITH ME A SECOND.

02:51PM 11 (PAUSE IN PROCEEDINGS.)

02:51PM 12 THE COURT: I'M GOING TO GRANT LIMITED RELIEF, NOT

02:52PM 13 AS BROAD AS PLAINTIFFS WANT. I'LL EXPLAIN WHY, AND I'LL GIVE A

02:52PM 14 MEMORANDUM OPINION IN DUE COURSE, BUT SINCE YOU'VE LEARNED THAT

02:52PM 15 EMPLOYEES ARE GOING TO BE TERMINATED TOMORROW FROM DOD, I THINK

02:52PM 16 I BETTER SAY WHAT I'M GOING TO SAY NOW.

02:52PM 17 CONGRESS HAS GIVEN THE AUTHORITY TO HIRE AND FIRE TO THE

02:52PM 18 AGENCIES THEMSELVES.

02:52PM 19 THE DEPARTMENT OF DEFENSE, FOR EXAMPLE, HAS STATUTORY

02:52PM 20 AUTHORITY TO HIRE, TO FIRE.

02:52PM 21 OPM DOES NOT. OFFICE OF PERSONNEL MANAGEMENT DOES NOT

02:52PM 22 HAVE ANY AUTHORITY WHATSOEVER UNDER ANY STATUTE IN THE HISTORY

02:53PM 23 OF THE UNIVERSE TO HIRE AND FIRE EMPLOYEES WITHIN ANOTHER

02:53PM 24 AGENCY.

02:53PM 25 IT CAN HIRE ITS OWN EMPLOYEES, YES, IT CAN FIRE THEM. BUT

02:53PM 1 IT CANNOT ORDER OR DIRECT SOME OTHER AGENCY TO DO SO.

02:53PM 2 I THINK ACTUALLY THE GOVERNMENT AGREES WITH THAT. THE

02:53PM 3 DEFENSE AGREES WITH THAT. IT WASN'T CLEAR BEFORE, BUT I THINK

02:53PM 4 THEY DO.

02:53PM 5 BUT THAT IS A CRYSTAL CLEAR STARTING POINT FOR THE

02:53PM 6 ANALYSIS HERE.

02:54PM 7 SO I'M GOING TO GO THROUGH SOME OF THE EVIDENCE.

02:54PM 8 THE QUESTION ON THE FACTS IS WHETHER OR NOT OPM ORDERED

02:54PM 9 THE AGENCIES TO TERMINATE PROBATIONARY EMPLOYEES WITH VERY

02:54PM 10 LIMITED EXCEPTIONS VERSUS WHETHER OPM GAVE GUIDANCE AND THAT

02:54PM 11 GUIDANCE WAS THEN TAKEN TO HEART BY THE AGENCIES THEMSELVES WHO

02:54PM 12 MADE THEIR OWN DECISION AND TERMINATED THESE PROBATIONARY

02:54PM 13 EMPLOYEES AND WILL DO SO IN THE FUTURE.

02:54PM 14 OPM DOES HAVE THE AUTHORITY TO GIVE GUIDANCE. IT'S NOT

02:54PM 15 BINDING. IT'S JUST GUIDANCE.

02:54PM 16 AND THE AGENCIES COULD THUMB THEIR NOSE AT OPM IF THEY

02:54PM 17 WANTED TO IF IT'S GUIDANCE.

02:54PM 18 BUT IF IT'S AN ORDER OR CAST AS AN ORDER, THEN THE

02:55PM 19 AGENCIES MAY THINK THAT THEY HAVE TO COMPLY EVEN THOUGH I'M

02:55PM 20 TELLING THEM RIGHT NOW THAT THEY DON'T.

02:55PM 21 OPM HAS NO AUTHORITY TO TELL ANY AGENCY IN THE

02:55PM 22 UNITED STATES GOVERNMENT, OTHER THAN ITSELF, WHO THEY CAN HIRE

02:55PM 23 AND WHO THEY CAN FIRE, PERIOD.

02:55PM 24 SO ON THE MERITS I THINK WE START WITH THAT IMPORTED

02:55PM 25 PROPOSITION.

02:55PM 1 NOW, ON JANUARY 20TH, CHARLES EZELL, ACTING DIRECTOR,

02:55PM 2 PROMULGATED A MEMORANDUM BASICALLY SAYING TAKE A LOOK AT ALL OF

02:55PM 3 THESE PROBATIONARY EMPLOYEES AND TAKE A CLOSE, HARD LOOK AND

02:56PM 4 SEE HOW MANY OF THEM YOU WANT TO RETAIN.

02:56PM 5 AND THEN ON FEBRUARY 13TH -- THE DEADLINE WAS SUPPOSED TO

02:56PM 6 BE THE 14TH. ON FEBRUARY 13TH THERE WAS A PHONE CALL THAT I

02:56PM 7 WISH I HAD A TRANSCRIPT OF, BUT NO ONE HAS SUPPLIED ME WITH

02:56PM 8 THAT QUITE DIRECTLY.

02:56PM 9 BUT IN THAT IT WAS THEN FOLLOWED UP BY THE FEBRUARY 14TH

02:56PM 10 EMAIL. AND THE REASON I BELIEVE THAT PLAINTIFFS ARE LIKELY TO

02:56PM 11 SUCCEED ON THE MERITS ON WHETHER OR NOT IT WAS AN ORDER IS

02:56PM 12 BECAUSE SO MANY AGENCIES HAVE SAID SO. MAYBE THEY WEREN'T ON

02:56PM 13 THE PHONE CALL, BUT THEY HAVE SAID SO TO CONGRESS IN OTHER

02:57PM 14 PLACES UNDER OATH THAT IT WAS A DIRECTIVE.

02:57PM 15 I'LL JUST SUMMARIZE.

02:57PM 16 NSF, WE WERE DIRECTED.

02:57PM 17 DOD, IN ACCORDANCE WITH DIRECTION FROM OPM.

02:57PM 18 THE VA, THERE WAS DIRECTION FROM THE OFFICE OF PERSONNEL

02:57PM 19 MANAGEMENT.

02:57PM 20 I.R.S., REGARDING THE REMOVAL OF PROBATIONARY EMPLOYEES,

02:57PM 21 AGAIN, THAT WAS SOMETHING THAT WAS DIRECTED FROM OPM. EVEN THE

02:57PM 22 LETTERS THAT YOUR COLLEAGUES RECEIVED YESTERDAY WERE LETTERS

02:57PM 23 THAT WERE WRITTEN BY OPM PUT THROUGH THE TREASURY AND GIVEN TO

02:57PM 24 US.

02:57PM 25 DOE, PER OPM INSTRUCTIONS, DOE FINDS YOUR FURTHER

02:57PM 1 EMPLOYMENT.

02:57PM 2 SO HOW COULD ALL OF THIS -- THIS IS SO -- HOW COULD SO

02:57PM 3 MUCH OF THE WORK FORCE BE AMPUTATED SUDDENLY OVER NIGHT? IT'S

02:58PM 4 SO IRREGULAR AND SO WIDESPREAD AND SO ABERRANT FROM -- IN THE

02:58PM 5 HISTORY OF OUR COUNTRY, HOW COULD THAT ALL HAPPEN WITH EACH

02:58PM 6 AGENCY DECIDING ON ITS OWN TO DO SOMETHING SO ABERRATIONAL? I

02:58PM 7 DON'T BELIEVE IT. I BELIEVE THEY WERE DIRECTED OR ORDERED TO

02:58PM 8 DO SO BY OPM IN THAT TELEPHONE CALL. THAT'S THE WAY THE

02:58PM 9 EVIDENCE POINTS.

02:58PM 10 NOW, IT COULD BE -- I WANT TO COMPLIMENT THE GOVERNMENT

02:58PM 11 LAWYER BECAUSE YOU HAVE A -- THIS IS A HARD CASE TO MAKE, AND

02:58PM 12 YOU'VE DONE AN HONORABLE JOB. BUT THE EVIDENCE, EVEN THOUGH

02:58PM 13 IT'S CIRCUMSTANTIAL, IT'S NOT REALLY PRELIMINARY, BUT IT'S ALL

02:58PM 14 WE'VE GOT RIGHT NOW, IT POINTS AGAINST YOU AND IT POINTS IN

02:58PM 15 FAVOR OF THE PLAINTIFFS THAT THERE WAS AN ORDER TO TERMINATE

02:59PM 16 THESE PEOPLE.

02:59PM 17 NOW, IT COULD BE I THINK -- LET'S SAY THE JUSTICE

02:59PM 18 DEPARTMENT -- I DON'T KNOW, IT'S NOT IN THE RECORD -- THAT THEY

02:59PM 19 DIDN'T DO THIS. WELL, THE JUSTICE DEPARTMENT IS FULL OF

02:59PM 20 LAWYERS. THEY'RE GOING TO KNOW THAT OPM IS JUST OUT IN LEFT

02:59PM 21 FIELD. THEY DON'T HAVE THE AUTHORITY TO TELL US TO DO THIS,

02:59PM 22 SCREW THEM. SO THERE ARE GOING TO BE SOME AGENCIES WHO DO

02:59PM 23 THAT.

02:59PM 24 BUT THERE ARE GOING TO BE OTHER AGENCIES WHO ARE NOT AS

02:59PM 25 STRONG, NOT AS WELL-VERSED, WILLING TO KOWTOW TO OPM WHO TELLS

02:59PM 1 THEM WHAT TO DO.

02:59PM 2 SO THAT'S WHAT HAS HAPPENED HERE, WE'VE LOST A LOT OF

02:59PM 3 PROBATIONARY EMPLOYEES.

02:59PM 4 ALL RIGHT. NOW, ULTRA VIRES. OPM DOESN'T HAVE AUTHORITY

02:59PM 5 TO DO THAT. IT'S ULTRA VIRES. OPM DOES NOT HAVE AUTHORITY TO

03:00PM 6 DO THIS. ULTRA VIRES, THAT MEANS IT'S BEYOND WHAT CONGRESS

03:00PM 7 TOLD THEM THEY HAVE THE AUTHORITY TO DO.

03:00PM 8 BUT THAT'S NOT THE END OF THIS COMPLICATED PROBLEM.

03:00PM 9 LET'S TURN TO THE ISSUE OF JURISDICTION.

03:00PM 10 THE GOVERNMENT I AGREE WITH.

03:00PM 11 WITH RESPECT TO THE UNION PLAINTIFFS, EVERY CASE IS ON

03:00PM 12 POINT AGAINST YOU. IT'S SAYING YOU'VE GOT TO CHANNEL YOUR

03:00PM 13 CLAIMS THROUGH THE EMPLOYEES MERITS SYSTEMS PROTECTION BOARD.

03:00PM 14 NOW, I'M GOING TO FOLLOW THOSE OTHER DECISIONS WITH RESPECT TO

03:00PM 15 THE UNIONS.

03:00PM 16 I DO THINK THAT THERE IS AN ARGUMENT TO BE MADE IN FAVOR

03:00PM 17 OF THE UNIONS THAT I DON'T THINK YOU ACTUALLY MADE IT, BUT

03:01PM 18 MAYBE YOU SOMEHOW IN A FOOTNOTE DID, BUT TO MY MIND, WHEN

03:01PM 19 CONGRESS SET UP THE MSPB, WHICH I KIND OF REMEMBER, IT WAS

03:01PM 20 THINKING OF AN INDIVIDUAL WHO GOT SCREWED OVER IN THE CIVIL

03:01PM 21 SERVICE. IT WASN'T THINKING OF MASSIVE, MASSIVE TERMINATIONS

03:01PM 22 THAT WOULD TAKE YEARS TO ADJUDICATE.

03:01PM 23 SO IS AN AGENCY ACTION THIS WIDESPREAD WITHIN THE

03:01PM 24 GOVERNMENT REALLY SOMETHING THAT CONGRESS INTENDED TO CHANNEL

03:01PM 25 THROUGH THE MERITS SYSTEMS PROTECTION BOARD?

03:01PM 1 IF I WERE WRITING ON A CLEAN SLATE I WOULD SAY NO, BUT  
03:01PM 2 IT'S NOT A CLEAN SLATE. AND ON THE SLATE THAT WE'VE GOT,  
03:01PM 3 PLAINTIFFS LOSE ON JURISDICTION AS TO THE UNIONS.  
03:01PM 4 BUT AS TO THE ORGANIZATIONS, THE PLAINTIFFS WIN. I DO  
03:01PM 5 BELIEVE THAT THE PLAINTIFFS HAVE ORGANIZATIONAL STANDING UNDER  
03:02PM 6 SIERRA CLUB V. MORTON AND ITS PROGENY. AND THEY'VE SHOWED THAT  
03:02PM 7 THE MEMBERS ARE HURT, THE ORGANIZATIONS ARE HURT BY THESE  
03:02PM 8 MASSIVE LAYOFFS -- NOT LAYOFFS, TERMINATIONS. THEY'RE NOT EVEN  
03:02PM 9 LAYOFFS, THEY'RE TERMINATIONS, IN MANY CASES FOR PERFORMANCE,  
03:02PM 10 WHICH IS NOT TRUE.  
03:02PM 11 I JUST WANT TO SAY, IN ONE CASE, FIVE DAYS BEFORE HE WAS  
03:02PM 12 TERMINATED FOR PERFORMANCE HE GOT A GLOWING REPORT. THAT WAS A  
03:02PM 13 GUY IN THE NSA I THINK.  
03:02PM 14 THAT DOESN'T LOOK RIGHT. THAT'S JUST NOT RIGHT IN OUR  
03:02PM 15 COUNTRY, IS IT, THAT WE RUN OUR AGENCIES WITH LIES LIKE THAT  
03:02PM 16 AND STAIN SOMEBODY'S RECORD FOR THE REST OF THEIR LIFE? WHO IS  
03:02PM 17 GOING TO WANT TO WORK IN A GOVERNMENT THAT WOULD DO THAT TO  
03:02PM 18 THEM?  
03:02PM 19 PROBATIONARY EMPLOYEES ARE THE LIFELOOD OF OUR  
03:03PM 20 GOVERNMENT. THEY COME IN AT THE LOW LEVEL, AND THEY WORK THEIR  
03:03PM 21 WAY UP, AND THAT'S HOW WE RENEW OURSELVES AND REINVENT  
03:03PM 22 OURSELVES IN THE GOVERNMENT IS THROUGH PROBATIONARY EMPLOYEES.  
03:03PM 23 THEY'RE THE BRIGHT MINDS THAT COME OUT OF COLLEGE AND PH.D.'S,  
03:03PM 24 THE GENIUSES, AND THEY COME IN AS PROBATIONARY EMPLOYEES AND  
03:03PM 25 MAYBE THEY RISE UP, AND THEY ARE CONTRIBUTING TO OUR COUNTRY

03:03PM 1 AND THEY WANT TO CONTRIBUTE.

03:03PM 2 SO WHEN WE TERMINATE PROBATIONARY EMPLOYEES IN A MASSIVE

03:03PM 3 WAY, IT HURTS THE MISSION OF THE AGENCIES WHICH IN TURN, THIS

03:03PM 4 COMES TO THEIR CONCRETE INJURY, IT HURTS THE MISSION OF THESE

03:03PM 5 ORGANIZATIONAL PLAINTIFFS.

03:03PM 6 SO I THINK THERE IS JURISDICTION AND STANDING WITH RESPECT

03:03PM 7 TO THE ORGANIZATIONAL PLAINTIFFS.

03:04PM 8 NOW, IN TERMS OF RELIEF, I MIGHT SAY IT BETTER IN

03:04PM 9 SOMETHING IN WRITING, BUT I DON'T HAVE IT READY YET. BUT I AM

03:04PM 10 GOING TO HOLD THAT BY WAY OF RELIEF THAT THIS FEBRUARY 14TH

03:04PM 11 EMAIL COMMUNICATION AND THE JANUARY 20TH COMMUNICATION AND ALL

03:04PM 12 EFFORTS BY OPM IN SUPPORT THEREOF VIS-A-VIS THE AGENCIES THAT

03:04PM 13 ARE AFFECTED BY THESE PLAINTIFFS, AND I'VE GOT TO LIMIT IT TO

03:04PM 14 THOSE PLAINTIFFS AND THOSE AGENCIES, IS ILLEGAL, SHOULD BE

03:04PM 15 STOPPED, RESCINDED, AND I'M ORDERING OPM TO TELL THOSE AGENCIES

03:04PM 16 THAT. IT'S ON THE GROUND OF ULTRA VIRES, AND IT'S ALSO ON THE

03:05PM 17 GROUND THAT IT VIOLATES THE APA AS A -- THEY SHOULD HAVE GONE

03:05PM 18 THROUGH THE PUBLIC RULE MAKING PROCESS, BUT THAT'S NOT THE MAIN

03:05PM 19 POINT. THE MAIN POINT IS ULTRA VIRES.

03:05PM 20 SO I DO NOT HAVE A -- I HAVE NOT TRACED IT OUT. I HAD IT

03:05PM 21 TRACED OUT SOMEWHERE. THE COMMUNICATIONS WOULD ONLY HAVE TO GO

03:05PM 22 FROM OPM TO THE AGENCIES THAT ARE AFFECTED BY THESE

03:05PM 23 ORGANIZATIONAL PLAINTIFFS.

03:05PM 24 IT'S NOT EVERYBODY IN THE GOVERNMENT. YOU DON'T HAVE

03:05PM 25 EVERYTHING COVERED. I DON'T WANT TO HEAR ARGUMENT. I'M RULING

03:05PM 1 NOW.

03:05PM 2 SO IT WOULD BE THE NATIONAL PARKS SERVICE. IT WOULD BE

03:05PM 3 EVERY AGENCY THAT IS INVOLVED WITH THE VETERANS ADMINISTRATION.

03:05PM 4 IT WOULD BE BLM, PARK SERVICE, NSF.

03:06PM 5 (DISCUSSION OFF THE RECORD.)

03:06PM 6 THE COURT: MY LAW CLERK IS TELLING ME I MISSPOKE,

03:06PM 7 BUT I DON'T UNDERSTAND WHAT HE'S TALKING ABOUT. SO I'LL FIX IT

03:06PM 8 IN A MEMORANDUM OPINION.

03:06PM 9 BUT THAT'S MY RULING FOR TEMPORARY RELIEF.

03:06PM 10 SO I WANT YOU TO COMMUNICATE THIS BACK.

03:06PM 11 NOW, WHAT ABOUT THE DOD? WELL, THE DOD IS NOT A PARTY AND

03:06PM 12 THERE'S NOBODY IN OUR RECORD -- IS THERE ANYONE IN OUR RECORD

03:06PM 13 THAT WAS DOD?

03:07PM 14 I DON'T THINK SO. TELL ME.

03:07PM 15 I DON'T WANT TO HEAR ARGUMENT. I JUST WANT TO HEAR AN

03:07PM 16 ANSWER TO MY QUESTION, DO YOU HAVE AN ORGANIZATION THAT TIES

03:07PM 17 INTO DOD?

03:07PM 18 MS. LEYTON: IT DEPENDS ON A QUESTION THAT I HAVE.

03:07PM 19 THE VOTE VETS DOES REPRESENT MANY FEDERAL EMPLOYEES BECAUSE

03:07PM 20 30 PERCENT OF FEDERAL EMPLOYEES ARE VETERANS, SO THEY HAVE

03:07PM 21 MANY, MANY MEMBERS WHO ARE WORKING AT THE DEPARTMENT OF

03:07PM 22 DEFENSE.

03:07PM 23 THE COURT: ALL RIGHT. BASED ON THAT I'M GOING TO

03:07PM 24 SAY THAT I AM ORDERING OPM TODAY TO COMMUNICATE TO DOD TOMORROW

03:07PM 25 BEFORE THESE TERMINATIONS THAT THE JUDGE HAS RULED THAT THIS IS

03:07PM 1 INVALID, THE FEBRUARY 14TH, JANUARY 20TH, AND ALL EFFORTS BY  
03:07PM 2 OPM TO ENFORCE IT ARE INVALID PENDING FURTHER ORDER OF THE  
03:07PM 3 COURT.

03:07PM 4 NOW, I CAN'T ORDER DOD NOT TO TERMINATE THEM BECAUSE  
03:07PM 5 THEY'RE NOT A PARTY BECAUSE YOU DIDN'T BRING THEM IN AS A  
03:08PM 6 PARTY, BUT I'M DOING THE BEST I CAN WITH THE DECK I'VE BEEN  
03:08PM 7 DEALT.

03:08PM 8 ALL RIGHT. I WANT TO SET A HEARING AT WHICH -- WE SHOULD  
03:08PM 9 HAVE AN EVIDENTIARY HEARING.

03:08PM 10 AND THE GOVERNMENT GETS TO DEPOSE -- NOT DEPOSE. WE'RE  
03:08PM 11 GOING TO HAVE HIM TESTIFY HERE IN COURT.

03:08PM 12 NOW, THE RULES GIVE YOU -- SAY I'VE GOT TO DO IT WITHIN  
03:08PM 13 14 DAYS. I'M WILLING TO DO IT WITHIN 14 DAYS, BUT IF YOU WILL  
03:08PM 14 ALL STIPULATE, WE CAN DO IT LATER, I WOULD PREFER TO DO IT  
03:08PM 15 LATER.

03:08PM 16 BUT WE'RE GOING TO HAVE EZELL COME OUT HERE AND HE'S GOING  
03:08PM 17 TO BE UNDER OATH RIGHT UP THERE AND THESE LAWYERS ARE GOING TO  
03:08PM 18 QUIZ HIM. AND IF THERE IS ANY RECORD OF THAT TELEPHONE CALL,  
03:08PM 19 IT SHOULD BE PRESERVED AND PRESENTED HERE IN COURT.

03:08PM 20 SO I WANT TO SEE THAT.

03:08PM 21 ALL RIGHT. WHAT IS YOUR -- I DON'T WANT YOU TO ARGUE --  
03:09PM 22 LET'S JUST FOCUS ON -- DO YOU UNDERSTAND WHAT I'M SAYING ABOUT  
03:09PM 23 THE TRO?

03:09PM 24 MS. LEONARD: I DO, YOUR HONOR.

03:09PM 25 ONE POINT OF CLARIFICATION. THERE'S ONE MORE

03:09PM 1 ORGANIZATION, MAIN STREET ALLIANCE, THAT IS SMALL BUSINESS, AND  
03:09PM 2 THE SMALL BUSINESS ADMINISTRATION --  
03:09PM 3 THE COURT: THEN THEY SHOULD BE NOTIFIED, SBA SHOULD  
03:09PM 4 BE NOTIFIED.  
03:09PM 5 MS. LEONARD: AND THEN ALSO, YOUR HONOR, WE WOULD BE  
03:09PM 6 HAPPY TO DO THAT HEARING WITHIN 14 DAYS.  
03:09PM 7 THE COURT: AM I HEARING 14 DAYS?  
03:09PM 8 THE CLERK: YOU ARE, YOUR HONOR.  
03:09PM 9 THE COURT: I AM. OKAY. I'M A SENIOR JUDGE, AND  
03:09PM 10 I'M NOT HERE EVERY DAY ANYMORE.  
03:09PM 11 OKAY. WOULD YOU LIKE TO DO IT IN 14 DAYS?  
03:09PM 12 MR. HELLAND: I THINK WE CAN BE -- I HAVE TO CONSULT  
03:09PM 13 WITH AGENCIES.  
03:09PM 14 THE COURT: ALL RIGHT.  
03:09PM 15 MR. HELLAND: I'M ALSO HAPPY TO CONFER WITH  
03:09PM 16 PLAINTIFFS ON THE SCHEDULE. WE CAN SET IT FOR 14 DAYS BUT  
03:09PM 17 PERHAPS -- --  
03:09PM 18 THE COURT: ALL RIGHT. LET'S SET IT FOR 14 DAYS.  
03:09PM 19 WE'LL START IT AT 8:00 A.M. RIGHT HERE.  
03:09PM 20 NOW, YOU SHOULD TELL US WHICH ONES OF THEIR MANY  
03:10PM 21 DECLARANTS YOU WOULD LIKE TO CROSS-EXAMINE BECAUSE WE'RE GOING  
03:10PM 22 TO BE FAIR BOTH WAYS. AND IF THERE'S ANYBODY ELSE IN THE -- I  
03:10PM 23 THINK MAYBE IT WOULD BE NICE TO HAVE SOMEBODY WHO WAS IN THAT  
03:10PM 24 PHONE CALL FROM THE AGENCIES, BUT YOU DON'T EVEN KNOW WHO THEY  
03:10PM 25 ARE YET.

03:10PM 1 MS. LEONARD: IF I MAY, YOUR HONOR, ON THAT POINT?

03:10PM 2 WOULD WE BE ABLE TO GET EXPEDITED DISCOVERY IN THE FORM OF THE

03:10PM 3 GOVERNMENT IDENTIFYING THE INDIVIDUALS WHO WERE ON THAT PHONE

03:10PM 4 CALL WITHIN A COUPLE DAYS SO THAT WE CAN DECIDE --

03:10PM 5 THE COURT: YES. WHY DON'T WE GIVE THEM UNTIL NEXT

03:10PM 6 TUESDAY AT NOON, JUST THE IDENTIFICATION OF THOSE PEOPLE, AND

03:10PM 7 THEN MAYBE YOU GET TO PICK OUT THREE OR FOUR OF THOSE PEOPLE,

03:10PM 8 AND WE'LL ORDER THEM TO BE HERE AT THE EVIDENTIARY HEARING.

03:10PM 9 BUT THERE'S NOT TIME TO GO INTO DOCUMENT DISCOVERY AND

03:10PM 10 ALL. THIS IS NOT YOUR BIG ANTITRUST CASE. WE'VE GOT TO BE

03:10PM 11 VERY NARROWLY FOCUSED.

03:10PM 12 BUT WOULD YOU LIKE TO DEPOSE ANY -- I THINK YOU SHOULD

03:11PM 13 THINK ABOUT IT AND LET THEM KNOW AND SAY, HEY, I WANT TO TALK

03:11PM 14 TO MR. NEUBACHER. IS THAT HIS NAME? HE USED TO BE THE

03:11PM 15 SUPERVISOR -- I THINK I USED -- I DIDN'T KNOW HIM PERSONALLY,

03:11PM 16 BUT BACK WHEN I HAD A LOT TO DO WITH YOSEMITE, I THINK HE WAS

03:11PM 17 THE SUPERINTENDANT, BUT HE'S NOT THERE ANYMORE.

03:11PM 18 SO YOU PICK OUT ONE. YOU PICK OUT FIVE. AND THEN IT MAY

03:11PM 19 TAKE US MORE THAN ONE DAY, BUT I HOPE WE CAN GET IT ALL DONE IN

03:11PM 20 ONE DAY IN TERMS OF AN EVIDENTIARY HEARING.

03:11PM 21 I CAN'T ORDER WHAT I'M ABOUT TO SAY BECAUSE WE DON'T HAVE

03:11PM 22 THE PARTIES IN FRONT OF ME TO GIVE RELIEF, BUT I AM GOING TO

03:11PM 23 COUNT ON THE GOVERNMENT TO DO THE RIGHT THING AND TO GO A

03:11PM 24 LITTLE BIT FURTHER THAN I HAVE ORDERED AND TO LET SOME OF THESE

03:12PM 25 AGENCIES KNOW WHAT I HAVE RULED BECAUSE I WOULD HATE FOR

03:12PM 1 PROBATIONARY EMPLOYEES TO LOSE THEIR JOB AND FOR THE GOVERNMENT  
03:12PM 2 TO BE COMPROMISED. AS I SAID, THESE ARE YOUNG PEOPLE AND  
03:12PM 3 PROBATIONARY EMPLOYEES ARE THE LIFELOOD OF THESE AGENCIES, AND  
03:12PM 4 IT WOULD BE A SHAME FOR SOMEBODY -- FOR THEM TO BE COMPROMISED  
03:12PM 5 AND PREJUDICED NOT KNOWING ABOUT THE RULING AT LEAST BY ONE  
03:12PM 6 DISTRICT JUDGE OUT IN CALIFORNIA.

03:12PM 7 I'LL TRY TO GET OUT A MEMORANDUM OPINION THAT EXPLAINS A  
03:12PM 8 LITTLE BIT MORE.

03:12PM 9 OKAY. ARE THERE ANY -- DO YOU UNDERSTAND THE RELIEF  
03:12PM 10 GRANTED?

03:12PM 11 MR. HELLAND: I DO, YOUR HONOR.

03:12PM 12 THE COURT: ALL RIGHT. ANYTHING YOU WANT TO BRING  
03:12PM 13 UP ABOUT THE SCHEDULE GOING FORWARD?

03:12PM 14 MS. LEONARD: ONE MORE PIECE OF BUSINESS,  
03:12PM 15 YOUR HONOR. WE HAVE ALREADY USED OUR ONE FREE AMENDMENT AND TO  
03:13PM 16 THE EXTENT THAT WE WISH TO ADD AGENCIES AS RULE 19 DEFENDANTS,  
03:13PM 17 DO WE HAVE LEAVE TO AMEND THE COMPLAINT AGAIN, YOUR HONOR?

03:13PM 18 THE COURT: YEAH, I'D SAY YOU SHOULD HAVE LEAVE TO  
03:13PM 19 DO THAT BUT THAT'S GOING TO BE -- IT COULD BE A VERY BIG JOB.  
03:13PM 20 BUT, YES, YOU HAVE LEAVE TO AT LEAST MAKE THE MOTION. I'M NOT  
03:13PM 21 GRANTING OR APPROVING IT IN ADVANCE. YOU HAVE LEAVE TO MAKE  
03:13PM 22 THE MOTION.

03:13PM 23 MS. LEYTON: THANK YOU, YOUR HONOR.

03:13PM 24 THE COURT: OKAY. WE HAVE NO FURTHER BUSINESS  
03:13PM 25 TODAY. WE HAVE A PLAN FOR GOING FORWARD. GOOD LUCK TO BOTH

03:13PM 1 SIDES.

03:13PM 2 THE CLERK: CLERK COURT IS ADJOURNED.

03:13PM 3 (COURT CONCLUDED AT 3:13 P.M.)

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3 CERTIFICATE OF REPORTER  
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7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE  
8 UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
9 CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO  
10 HEREBY CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS  
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
13 ABOVE-ENTITLED MATTER.

14   
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IRENE RODRIGUEZ, CSR, RMR, CRR  
17 CERTIFICATE NUMBER 8074  
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19 DATED: FEBRUARY 28, 2025  
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